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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 303

WILLIAM R. TUCKER, VICE-CONSUL OF RUSSIA AT PHILADELPHIA, PENNSYLVANIA, PETITIONER,

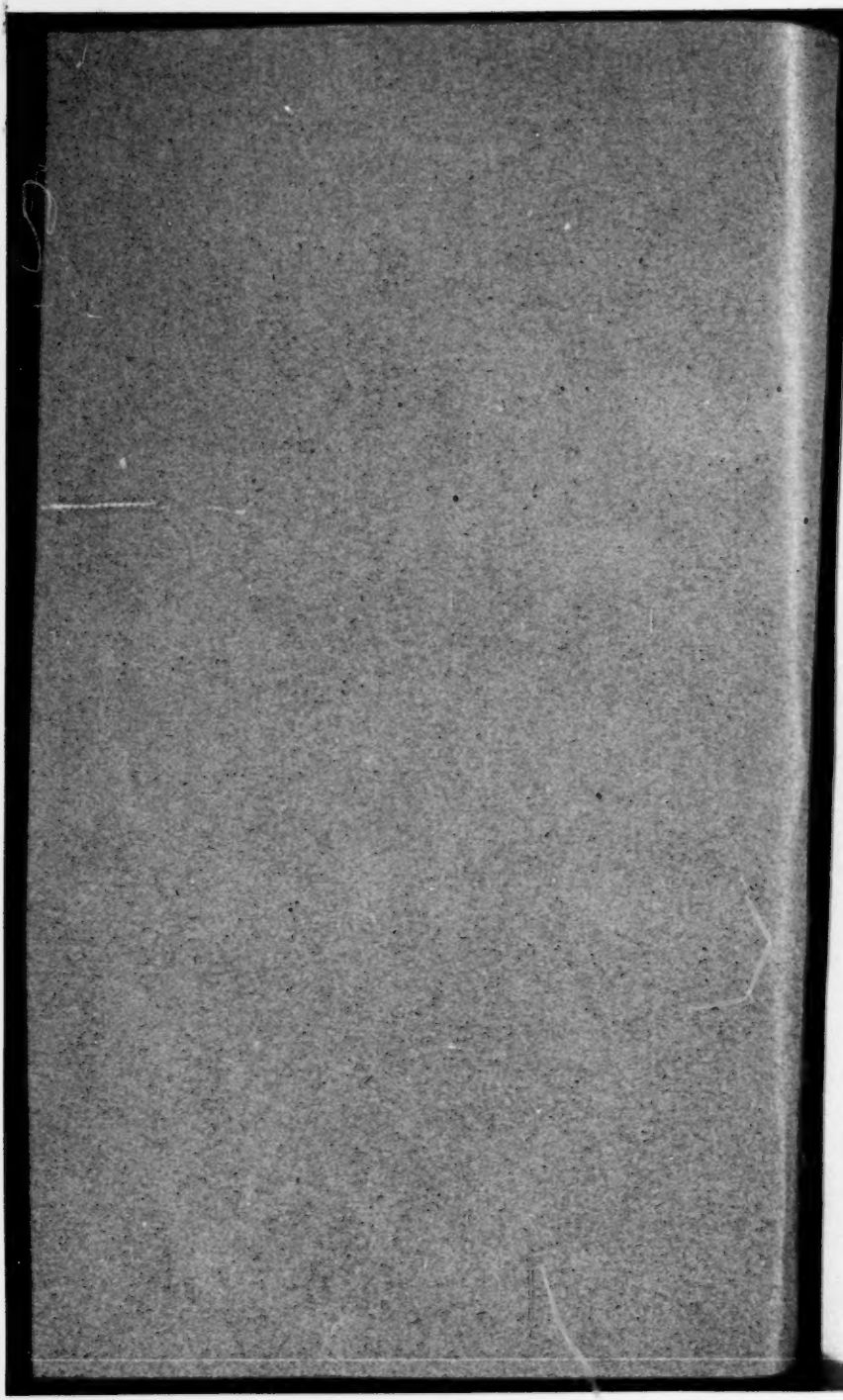
vs.

THE UNITED STATES EX REL. LEO ALEXANDROFF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 22, 1901.
CERTIORARI AND RETURN FILED MAY 4, 1901.

(18,127.)



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a *Transcript of Record.*

United States Circuit Court of Appeals for the Third Circuit, September Term, 1900.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,
vs.
THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.
} No. —.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

Filed August 21, 1900.

1 In the District Court of the United States for the Eastern District of Pennsylvania, of May Sessions, 1900.

THE UNITED STATES OF AMERICA *ex Rel.* LEO Alexandroff
vs.
ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag."
} *Habeas Corpus.*

Pleas before the honorable the judge of the district court of the United States for the eastern district of Pennsylvania.

It is thus contained:

Be it remembered that on the 18th day of June, A. D. 1900, Bernard Harris, Esq., and Isaac Hassler, Esq., attorneys of said court, come into said court and present the petition of Leo Alexandroff, relator, and the same being filed, is in the words and figures following, to wit:

Petition.

In the District Court of the United States for the Eastern District of Pennsylvania.

Petition of Leo Alexandroff.

To the Honorable John B. McPherson, United States district judge for the eastern district of Pennsylvania:

The petition of Leo Alexandroff respectfully showeth: That your petitioner is unjustly held and detained and illegally confined in Moyamensing prison, in the county of Philadelphia, State of Pennsylvania, upon a warrant issued by United States Commissioner Edmunds, which warrant was issued upon affidavit made by Captain Vladimir Behr, master of the Russian cruiser "Variag," a copy of which affidavit is hereunto annexed.

Your petitioner avers that on the 24th day of May, 1900, at the city of New York, he has declared on oath, before the proper authorities, that *he* is *bona fide* his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty, whatever,
2 and particularly to the Emperor of Russia, of whom he was then a subject.

That your petitioner never deserted the vessel "Variag" and that he never set his foot on that vessel as a seaman thereof.

Your petitioner therefore prays your honorable court to award a writ of *habeas corpus*, directed to Robert C. Motherwell, Jr., the keeper of the said Moyamensing prison and to Captain Vladimir Behr aforementioned, so that your petitioner may be brought before your honorable court; to do, submit to, and receive what the laws may require.

And your petitioner will ever pray, etc.

LEO ALEXANDROFF, *Petitioner.*

CITY AND COUNTY OF PHILADELPHIA, *ss:*

Leo Alexandroff, being duly sworn according to law, deposes and says that the facts set forth in the above petition are true.

LEO ALEXANDROFF.

Sworn to and subscribed before me this 15th day of June, 1900.

ROBERT W. LLOYD,
[SEAL.] *Notary Public.*

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

Captain Vladimir Behr, being duly sworn according to law, deposes and says that he is master of the Russian cruiser "Variag," now at the port of Philadelphia. That Theodor Rushkin, Alexis Guseff, Georg Andrieff, Martin Purin, Gregory Williamson, Leo Alexandroff are duly engaged seamen of said vessel, whose term of service has not expired.

That said Theodor Rushlin, Alexis Guseff, Georg Andrieff, Martin Purin, Gregory Williamson, Leo Alexandroff did, on or before April 25, 1900, and within one year prior thereto, desert from said vessel without any intention of returning thereto.

(S'g'd) VLADIMIR BEHR.

Sworn to and subscribed before me this 26th day of April, A. D. 1900.

[SEAL.] (S'g'd) CHARLES WELSH EDMUNDS.

And thereupon a writ of *habeas corpus*, as prayed for, being allowed by the honorable, the judge of the court, and issued,
3 is, with the return of Robert C. Motherwell, Jr., thereto, in the words and figures following, to wit:

Writ of Habeas Corpus.

UNITED STATES, *Eastern District of Pennsylvania,* } *ss.*:

The President of the United States to Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," Greeting:

We command you, that the body of Leo Alexandroff in prison, under your custody, as it is said, detained by whatsoever names the said Leo Alexandroff may be detained, together with the day and cause of being taken and detained, you have before the Honorable John B. McPherson, judge of the district court of the United States in and for the eastern district of Pennsylvania, at the room of the district court of the United States, in the city of Philadelphia, immediately, then and there to do, submit to and receive whatsoever the said judge shall then and there consider in that behalf; and have you then there this writ.

Witness the Honorable John B. McPherson, judge of said court at Philadelphia, this 18th day of June, A. D. 1900 and in the 124th year of the Independence of the said United States.

[SEAL.] CHARLES S. LINCOLN,
Clerk District Court.

Endorsed: U. S. district court. The United States *ex rel.* Leo Alexandroff *vs.* Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag." *Habeas corpus.* Returnable forthwith. Time appointed for hearing, Wednesday, June 20, 1900, at 10 o'clock a. m. Bernhard Harris, Esq., Isaac Hassler, Esq., attorneys for the relator.

Return to Writ.

To the honorable the judge within named:

I now produce the body of Leo Alexandroff, as commanded by you, for your adjudication, and respectfully submit copy of precept, by virtue of which he is detained in custody.

R. C. MOTHERWELL, JR.,
Supt. Phila. County Prison,
Per JOHN E. SCHAEFER.

June 20, 1900.

4 *Copy of Commitment*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *sct:*

The President of the United States of America to the marshal of said district and to the keeper of the criminal apartment of the Philadelphia county prison, at Moyamensing:

These are to command you, the said marshal, forthwith to deliver into the custody of the said keeper the body of Leo Alexandroff, charged on oath before Henry R. Edmunds, United States commissioner, with desertion from the Imperial Russian cruiser "Variag," and apprehended upon my warrant issued at the request of the vice-consul of Russia at Philadelphia upon the complaint of the captain of said cruiser "Variag" in accordance with the term- of the treaty between the United States and Russia — with the act of Congress in such case made and provided.

And you, the said keeper of the said prison are hereby required to receive the said Leo Alexandroff into your custody in the said prison and — the same safely keep him subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser "Variag," or until he shall be discharged by the due course of law.

Witness the hand and seal of the said commissioner at Philadelphia this first day of June A. D. 1900 and in the 124th year of the Independence of the United States.

Copy.

[SEAL.]

HENRY R. EDMUNDS,
United States Commissioner.

Testimony.

And afterwards, the cause comes on to be heard, and the testimony adduced having been reduced to writing and filed, is in the words and figures following, to wit:

UNITED STATES *ex Rel.* LEO ALEXANDROFF
vs.
ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag." } *Habeas Corpus.*

Hearing before Judge McPherson, U. S. district court, Saturday, June 23, 1900, 10 a. m.

Present: Messrs. Harris and Hassler for the writ; Messrs. Adler and Cheyney, *contra;* Samuel Dickson, Esq., for Mr. Cramp.

5 LEO ALEXANDROFF, being called as a witness, was sworn and examined through the medium of a sworn interpreter.

By Mr. HARRIS:

Q. How old are you?
A. Twenty-one years old.
Q. When did you enter the Russian navy?
A. I entered the service in 1896.
Q. How old were you then?
A. Seventeen years old.
Q. When did you arrive in the United States?
A. The 14th of October, 1899, I arrived in this country.
Q. How old were you then?
A. Twenty years old when I arrived.
Q. What was your position in the Russian navy?
A. I was an assistant physician.
Q. Did you ever have any active service as a seaman?
A. My duty was to attend to the sick.
Q. How did you get here in a Russian or in any other ship, and if any other, in which ship?
A. I came here in a passenger steamer, not a Russian.
Q. What was the name of the steamer?
A. We came in the steamer "St. Paul" from Southampton.
Q. Since you have been in America where have you stopped?
A. I lived together with the crew of the Russian ship that is in process of construction.
Q. Did you live on board the ship or elsewhere?
A. I never was on the ship. I never saw the ship except once.
Q. Did you ever sign any paper as a member of the crew of the cruiser "Variag"?
A. I never signed my name, and I was sent there unwillingly.
Q. Did they ask you whether you would be willing to become a member of the crew of the "Variag"?
A. I was never asked to become a member of the crew, but was simply sent there.
Q. What was your treatment at the hands of the superior officers of the crew since they have been in this country?
A. I cannot say that the superior officer- behaved very well toward me. Insults and undeserved punishments I suffered every day.

Mr. ADLER: Does your honor think this is material, the question as to what treatment he received? It seems to me it is irrelevant.

6 Mr. HARRIS: I think it is relevant, because if the treatment he received at the hands of the superiors of that crew were such as would compel a self-respecting man to leave, he would have a motive for leaving.

The COURT: The question is whether there would be justification.

Mr. HARRIS: It seems to me he would have had justification for leaving and a right to leave. It has never been said that a sailor in the employ of either a government or a private company would have to be subject to all sorts of ill-treatment and not have a right to leave on that account.

The COURT: I do not think that the courts of the United States are called upon to regulate those matters between the masters of foreign vessels and their crews. We cannot regulate their morals and their lives. That is not the ground on which the application is made to the court at all.

Mr. HARRIS: This is simply to throw a side view on the subject.

The COURT: Your position is, as I understand it, that he never was a member of the crew, and therefore did not desert.

Mr. HARRIS: That is it.

Q. When did you leave the crew of the ship?

A. I left the crew on the 20th of April.

Q. Since then where have you been?

A. Since then I lived one week in Philadelphia and then I left for New York.

Q. At the time you arrived in Philadelphia first what was the condition of the ship "Variag"?

A. When I arrived at Philadelphia the "Variag" was not finished.

Q. Where was it? Was it in the water or elsewhere?

A. The "Variag" was then not finished and not in the water. It was in the ship yard.

Q. Was the ship yet on the stocks?

A. It was on the stocks.

Q. Were you ever ordered to go upon board the ship "Variag" and perform any duties as a sailor or as assistant physician?

A. I never received orders to go on the "Variag" either as a sailor or as an assistant physician.

Q. Did you ever see the ship?

A. I saw the steamer "Variag" only while passing by.

Q. During the time that you have been here and that you saw the ship "Variag," did it have the Russian flag floating over it?

Mr. ADLER: If that question is confined to the only time this witness says he saw the "Variag," I have not any objection.

7 But as to whether during the time he was here the flag was flying is another question.

The COURT: It is understood to apply to the time he saw it. The question must be restricted to the time he saw it.

A. I never saw the Russian flag flying on the "Variag."

By Mr. HARRIS:

Q. What flag did it have?

A. I saw the American flag, but not the Russian.

Q. Was the ship "Variag," as far as your knowledge goes, in fact a Russian cruiser, and is it a Russian cruiser now?

The COURT: He cannot state that.

By Mr. HARRIS:

Q. Were you ever told by the captain of the ship that they accepted the vessel, and that you would go on it on a certain date?

A. Nobody told me that this "Variag" was ever going to become a Russian steamer or it was accepted except on general principles. I knew just as well as everybody else in the United States.

Q. When you say it was to become, what do you mean by that? Was it a Russian cruiser at the time, or was it not?

The COURT: You need not go into that. We understand that.

By Mr. HARRIS:

Q. Do you know of your own knowledge whether the Russian government has ever accepted that cruiser?

A. I do not know whether the Russian government accepted the "Variag."

Q. When you left the company of the cruiser "Variag," what was the condition of that cruiser at that time?

A. Although I cannot say in what condition the steamer was, not being used to this country, but I suppose it would take several months yet before it could be completed.

Q. How many months did they say it would take?

A. It was rumored that it would take about two or three months before it would be completed.

Q. After you left Philadelphia for New York, where did you live there?

A. I lived in a room in New York. I rented a room in New York.

Q. What did you do over there?

A. The first two weeks I was without employment and then was employed as a clerk in a lock store.

Q. Do you know anything about this paper? (Declaration of intention shown witness.)

8 A. I know all about this paper. It is a declaration of my intention of becoming a citizen of the United States.

Q. That declaration you made where?

A. I made this declaration in the city of New York.

Declaration of intention dated May 24, 1900, offered in evidence by Mr. Harris.

Mr. ADLER: I object to the paper being offered, on the ground

that the paper shows that the declaration was made after the desertion took place.

The COURT: That is a question as to the effect of the paper. We will receive the paper.

Cross-examination.

By Mr. ADLER:

Q. You received from the Russian government the equipment as a member of the Russian government, did you not?

A. Yes, sir; I received it. I received the equipment not as a member of the crew of a particular steamer, but in a general way as a servant of the Russian government.

Q. It is the custom in Russia in consideration of the education which the subjects receive, that they must serve a certain time in the navy or in the army; is that correct?

A. I had this privilege of serving less time on account of my education.

Q. What is the length of service in your case?

A. Six years.

Q. The subject is not required to sign any enlistment or anything of that kind, is he, but he is simply conscripted and taken into the army or navy?

A. He is simply sent to service without any signature on his part.

Q. When you left Russia to come to this country, you came here with a Russian officer, together with some fifty-three other men?

A. I left Russia in company with fifty-three men and accompanied by one officer.

Q. You knew before you left, did you not, that you were coming here to serve as one of the crew of the Russian cruiser "Variag"?

Mr. HARRIS: I object to the form of the question. It has already been stated by the witness that he knew in a general way he was going to become one of the company of the newly constructed cruiser. That is simply repetition.

The COURT: If that is conceded there is no use asking it again.

Mr. ADLER: I understand it is conceded that at the time he left Russia he knew he was coming here to be a member of this crew.

9 The COURT: That is my understanding of his position.

By Mr. ADLER:

Q. You arrived here some time in October and continued to live with the other members of the crew of this Russian cruiser until you left in April?

A. I lived with the crew all the time from October to April.

Q. Who supported you during that time?

A. I received support from the Russian government, but I claim I did not ask for it. I was simply compelled to serve and compelled to receive the wages.

Q. Did you perform the duties required of you as a member of this crew while you were here between October and April?

A. In so far as it was my place as an assistant physician.

Q. You left the Russian service in April of this year for the purpose of remaining in this country, did you?

A. I left the service in order to become a citizen of the United States and remain here all my life.

Q. Your intention was to obtain a position ashore, was it?

(Objected to as immaterial. Objection overruled.)

A. My intention was to get employment and live here ashore.

Q. While you were here you had your photograph taken with the other members of the crew of the "Variag," did you not?

A. Yes, sir; I had photographs taken.

Q. That is a copy of that photograph, is it not (photograph shown witness)?

A. Yes, sir.

Q. This is your photograph then (indicating)?

A. Yes, sir.

HENRY W. CRAMP, having been duly sworn, was examined as follows:

By Mr. HARRIS:

Q. You are a member of the firm of Cramp & Son?

A. I am an officer of it.

Q. In what capacity are you serving there as an officer?

A. Vice-president.

Q. Do you have any knowledge of the construction of the ship "Variag," for the Russian government?

A. In what respect?

Q. Do you know under what contract it was to be constructed?

A. Truly, yes.

Q. As far as your know, has the Russian government hoisted its flag upon the cruiser?

Mr. ADLER: May it please your honor, it does not seem to me that this question is material. The question whether this is a Russian vessel depends on the contract for its construction, and whether or not the flag was raised does not seem to be at all material.

The COURT: We will hear the facts and determine their effect afterwards.

A. I do not know whether it has been or not. I do not know that it has been or that it has not.

By Mr. HARRIS:

Q. Has the United States flag been taken down from the vessel yet?

A. I do not know that it ever was put up.

Q. Was there not an American flag upon the vessel some time ago?

A. There might have been one hundred times or twenty times I do not know.

Q. You did not see it?

A. No, sir.

Q. You do not know of your own personal knowledge?

A. If I did see it, I would not pay any attention to it. I would not consider it of any consequence.

Q. Is that steamer at the present time in your possession, or is it in the possession of the Russian government?

A. I presume that is a question of law which I am not qualified to answer.

Q. I mean actual possession. Is it in your actual possession or in the actual possession of the Russian government? I am not speaking of legal possession.

A. We have a contract which states the condition and status of ownership in regard to possession.

Q. Are your men still working on that vessel?

A. Yes, sir; many of them.

Q. Has the Russian company, sent here from Russia for the purpose of manning that cruiser, already taken possession of that cruiser?

A. I have no knowledge on that subject.

Q. Have you had your trial voyage?

A. We have had one trial.

Q. Was that trial satisfactory?

A. Satisfactory, yes; to us.

11 Q. Was it satisfactory to the Russian government?

A. I do not know that the Russian government has been heard on the subject. I have heard individual expressions from the Russian officers who were aboard, expressing their pleasure at the result.

Q. That ship was built by the Cramps, right here in the city of Philadelphia?

A. Yes, sir.

Q. Can you tell us what was the condition of the cruiser on the 20th of April, 1900?

A. No; I cannot.

Q. Can you tell us whether it was completed or far from completion on the 20th of April?

A. No; I have an opinion, but I could not say. I did not see her on the 20th of April.

Q. Did you see her at any time immediately preceding or succeeding the 20th of April?

A. Both.

Q. What was the condition of the ship, say two or three days before the 20th of April?

A. It would take a book to describe the condition of the ship. What do you mean exactly?

Q. I mean as far as its completion was concerned.

A. How far was it from completion at that time, or what time?

Q. How far was it from completion at that time?

A. The 20th of April?

Q. You said some date immediately preceding the 20th of April. Say two or three days before that.

A. I was sick abed for a couple of months or confined to the house, and that was all of March and April.

Q. When did you first see the cruiser after you had left your house?

A. Probably the first of May.

Q. What was the condition of the ship on the first of May?

A. It was very nearly completed.

The COURT: As the witness has already said there are many men working on the vessel, I do not see the relevancy of these details. You have the fact now that the steamer has a good many men of the Cramp Company still working on her. That is evidence in itself that she is not now completed, and, therefore, she could not have been completed then.

12 By Mr. HARRIS:

Q. When did the trial take place?

A. I do not know what that date was.

Q. Can you tell us whether it took place before or after the 20th of April?

A. No; I do not know the date.

Q. Under whose auspices was the trial conducted; who had charge of the vessel at the time of the trial?

A. Edwin S. Cramp, superintending engineer of the company.

Q. To your knowledge was there a crew ever organized and on board the cruiser "Variag," and had that crew charge of that vessel?

A. Such matters do not come under my province.

Q. Have you any knowledge of it at all?

A. I necessarily would not acquaint myself with the fact.

Q. I want to know whether you had knowledge?

A. I have not.

Q. Is it a custom with you to send one of your men abroad with a newly constructed vessel in order to deliver that vessel to the country ordering such a vessel?

A. Never.

Q. Where do you generally make delivery?

A. In Philadelphia.

Q. Is there any form attending such delivery?

A. In this particular case?

Q. No; in any case.

A. Yes, sir; there is a form. A ship to the United States Government is delivered to the League Island navy yard.

Q. In reference to foreign countries, what form is in vogue in reference to the delivery?

A. We have had so little experience in building ships for foreign countries that there is hardly a custom established.

Q. There is no custom established?

A. As far as our experience goes.

Q. As an officer of the corporation who built the ship, do you know of your own knowledge whether the Russian navy has a right to reject that ship?

A. I should say she had.

Q. Has the Russian government by and through its officers ever exercised any control over that vessel at all? In other words, is it not a fact that the whole and sole control of the vessel up to the present time is in the hands and in the power of the Cramps?

13 A. That is all described in the contract entirely.

Q. I want you to answer that question if you can. Is it not a fact that the sole control of that vessel is still vested in you as a corporation building that ship? Is not that a fact?

A. I do not know that it is.

Q. It seems to me you ought to know that. You surely ought to know whether the vessel is still in the control of the Cramps or whether it is in the control of the Russian government, and I must insist upon an answer to that question.

A. If there ever occurred a doubt or a question of possession as the owner of any property, I would refer the matter at once to counsel, as we are always well supplied in that respect.

Q. Do you mean to say you do not know whether it is under your control or under the control of the Russian government?

A. I should say while it is for ordinary intents and purposes under our control, yet it is above that under the control of the Russian government.

Q. Do you mean to say that it is actually under your control, as I understand you; that it is actually under your control; only the Russian government has a supervisory power? Is that it?

A. No; I should say that the Russian government has control of it.

Q. That is, they are able to supervise your work? Is not that it?

A. I should say that they could do more than that; that they could compel us to do other things. They could compel us to keep the ship insured.

Mr. DICKSON: He is now asking questions as to legal conclusions. The contract is very full. It seems to me this is a waste of time.

Mr. HARRIS: This is a question of fact, which we want to elicit from the lips of the witness.

The COURT: If the contract provides who shall have the control of the vessel, the contract is to be carried out.

Mr. HARRIS: We want to know who has the physical control.

The COURT: We know that it is in Cramps' custody.

Cross-examination.

By Mr. ADLER:

Q. This cruiser is being constructed by your company under a written contract with the Russian government, is it not?

A. Yes, sir.
Q. Have you a copy of that contract here?
A. Yes, sir.
Q. Is this a copy of the contract? (Copy of contract shown witness.)
14 A. Yes, sir.
A. No, sir.
Q. I understand this to be an exact copy of the contract with the exception that the prices are left out?
A. With the exception of the prices.
Q. This contract provides for certain payments to be made by the Russian government for this vessel as the work progresses. Can you tell me about what percentage of the total cost of the vessel has been already paid by the Russian government?

Mr. HASSLER: I understand this is not the original but a copy of the contract.

Q. Have you the original contract with you?
—. ——.
Q. Is this a copy or the original?
A. That is a copy of the original contract.
Q. Where is the original?
A. The original is in the office of the ship yard.

Mr. ADLER: Mr. Cramp was subpœnaed to produce the original contract by my friend, but, of course, the original contract contains the prices for this vessel between the Cramp Company and the Russian government, and I take it, in a proceeding in which they are not at all interested, that they do not care to disclose the private terms of the contract and Mr. Cramp has produced a printed copy, which is an exact copy, with the exception that the prices are omitted. It seems to me that for the purpose of this hearing, your honor would permit the use of the copy for all the purposes that you would the original.

Mr. HARRIS: We object to the question as put by Mr. Adler, because he refers to certain payments, and the contract prices of the vessel has been excluded from that part to which he referred in his question.

Mr. ADLER: I am not asking as to the amount. I am asking as to the percentage.

Mr. HASSLER: It does seem to me if we are to consider the contracts in this case, we ought to have the full contract.

The COURT: You have no concern with the price.

Mr. HASSLER: It may be very important in determining the question of property.

Mr. DICKSON: They called for a copy and it was produced. If they call for the original, it can be produced. If your honor will look at the contract, you will see the questions of property and title are fully settled by it.

The COURT: The question is a proper one and may be answered.

The following question read to the witness: "This contract
15 provides for certain payments to be made by the Russian government for this vessel as the work progresses. Can you tell me about what percentage of the total cost of the vessel has been already paid by the Russian government?"

A. I should say about eighty per cent.

By Mr. ADLER:

Q. The vessel is afloat in the water, is it not?

A. It is; yes, sir.

Q. She has had her first trial trip, I understood you to say?

A. Yes, sir.

Q. Can you tell me whether she has been baptized in accordance with the forms of the Russian government?

A. I do not know that of my own knowledge. I was ill at the time.

Q. Tell me when the vessel was launched.

A. In the fall of the year. October or November, I am not sure which.

JULIUS GEORGE, having been duly sworn, was examined as follows:

By Mr. HARRIS:

Q. What is your business?

A. Engineer.

Q. Do you know anything about the Russian ship "Variag"?

A. Yes, sir; I know parts of it.

Q. Have you ever seen it?

A. Yes, sir; I saw it from the outside, but they would not let me pass on board.

Q. Who was on board that ship?

A. The American people were working there.

Q. Was there any watch kept by any of the company of Russian sailors that came over here to man that steamer?

A. No. I never heard of it or never saw it.

Q. Did you ever see the Russian flag upon that ship?

A. No, sir.

Q. What flag did you see, if any?

A. I did not see any flag. I was there a couple of days before the trial came off and they raised the American flag, because the ship belonged to the United States, and after the money was paid the ship belonged to the Russian government and under the Russian rules.

Q. When did you last see the steamer?

16 A. About three weeks ago.

Q. Was it completed then, so far as you know?

A. No; not quite complete.

NICHOLAS AGLET, having been duly sworn, was examined as follows:

By Mr. HARRIS:

Q. What is your business?
A. Engineer.
Q. Were you once a member of the Russian navy?
A. Yes, sir.
Q. Do you know anything about the rules in reference to keeping watch on the ship?
A. Yes, sir; I know them.

The rest of the witness' examination was conducted through the medium of a sworn interpreter.

Q. What are the rules with reference to keeping watch on a Russian ship?
A. He must do what the officer will tell him.
Q. Who keeps watch there generally?
A. The captain watches the ship.
Q. That is at sea. Who watches the ship ashore?
A. Some sailors watch the ship.
Q. Do you know anything about the ship "Variag"?
A. Yes, sir.
Q. Did you ever see any of the Russian sailors watch that ship?
A. I never saw the ship but I saw the Russian sailors.
Q. Did you see the ship "Variag"?
A. I saw the ship from a distance passing by.
Q. You know a number of the company, do you not?
A. I know some members of the company.
Q. Did anybody ever tell you he had to go on board?

(Objected to.)

Mr. Adler offered in evidence contract between the Cramp Ship and Engine Building Company and the Russian government; produced and identified by Mr. Cramp.

Mr. Hassler stated that the fact that the contract was a copy was not objected to.

Mr. Adler offered in evidence original affidavit and letter from the imperial Russian vice-consul to the commissioner who committed this defendant and upon which the warrant was issued.

Mr. ADLER: For the information of your honor, I will offer
17 this as well. It shows that the proceedings have been in accordance with the treaty existing between the Russian government and this country, and also in accordance with the provisions of section 5280 of the Revised Statutes.

Mr. Adler also offered in evidence affidavit of Captain Vladimir Behr, dated the 26th day of April, 1900, in which it is alleged that the defendant, together with some other seamen, were duly engaged seamen on the vessel "Variag," whose term of service has not ex-

pired, and that on or before April 25, 1900, within one year prior thereto, — deserted the vessel without any intention of returning thereto.

Mr. Adler offered in evidence letter accompanying the above-offered affidavit, dated April 25, 1900, from William R. Tucker, the imperial Russian vice-consul, to the Hon. Henry R. Edmunds, United States commissioner.

(Letter read.)

Mr. HASSLER: I have no objection to these papers, in so far as they may show that the proceedings were formal, but I do object to them in so far as they may be offered as proof of the facts in the case.

Mr. ADLER: I do not offer them for that purpose. I merely offer them to show that the proceedings have been in accordance with the treaty and the Revised Statutes.

Mr. HASSLER: If the offer is made in that way I shall have no objection to it.

Mr. ADLER: I also have here the Russian officer who accompanied these fifty-three sailors to this country, together with the other members of the crew, who has with him the passport issued by his government entitling these men to come here. I understand it is admitted by the other side that this defendant did come here as a portion of the crew of this cruiser, and the passport so states. If that is admitted, I presume it is not necessary to offer the passport in evidence. If your honor cares to have it, I will produce this officer with the passport and offer it. It merely shows that this defendant, with fifty-two other members of a company in the Russian navy were admitted to free passage here to become members of the crew of the cruiser "Variag," and that he came here in pursuance of that passport accompanied by this officer.

Mr. HASSLER: I should object to the officer, not so much on account of what is in the passport, but my friend made a statement which I do not think is exactly accurate, as to what we stated. We stated this man came here with a company of men, but we do not state that he came here as part of the crew of the "Variag."

The COURT: He came here as a member of the Russian navy, ordered here to become one of the crew of the cruiser "Variag," and he came for that express purpose.

18 Mr. HASSLER: We concede that.

Mr. ADLER: I have also a letter from the acting Secretary of the Treasury Department of the United States permitting the landing of this crew. I have not got the original, I have merely a copy. I understand the original is in the possession of the Russian embassador at Washington. I offer the copy.

Mr. HASSLER: I should like this to go in without objection, but I cannot see what it has to do with the case, and it contains a statement which may prejudice our client's cause, and for that reason I object to it.

The COURT: I will admit it for what it is worth.

Mr. HASSLER: I will withdraw the objection.

Mr. Adler then offered in evidence the letter dated October 4, 1899, signed by the acting Secretary of the Treasury.

(Letter read.)

(Testimony closed.)

After discussion the court stated that it would hold the matter under consideration, giving an opportunity in the meantime for counsel to hand briefs to the court.

"EXHIBIT."

No. 19805.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 4, 1899.

SIR: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York, to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard in Philadelphia, Pennsylvania.

The collector of customs has also been advised that the usual head tax of $1.00 is not to be collected in this case.

Respectfully yours,

O. L. SPAULDING,
Acting Secretary T. U. S.

19 EXHIBIT.

No. 301. *Contract.*

Cruiser for imperial Russian navy.

The Wm. Cramp & Sons Ship & Engine Building Co., Philadelphia, Pa.

Dated April 11/23, 1898.

Cruiser.

This contract entered into this 11/23 day of April, 1898, between The William Cramp & Sons Ship and Engine Building Company of Philadelphia, Pa., United States of America, and hereinafter referred to as the contractors of the one part, and the Russian ministry of marine, in the person of the admiral contractor, Vice-Admiral Verhovsky, of the other part as follows:

General Conditions.

ART. 1. In consideration of the payments to be made, hereinafter mentioned, the contractors agree to supply to the imperial Russian government a protected cruiser built, equipped, armed and fitted, in

accordance with the preliminary specifications and drawings, also annexed, and in all respects equal to the best ships of corresponding type in the United States Navy.

The contractors undertake to provide and stow complete at their own expense, with the exception of the entire ordnance and torpedo outfit, all the stores necessary, and usual for the equipment of a vessel of this class when fitted for sea, in order that the vessel may be handed over to the charge of the persons appointed by the Russian ministry of marine in a condition in all respects (having her live ammunition on board) absolutely ready for immediate service as a commissioned ship, at the time and place hereinafter mentioned.

The contractors also bind themselves to perfectly finish the ship, including all carpenters', joiners', and painters' work, and in every respect fitted and equipped for sea, as described in detail in the specifications, and in general accordance with ships of the latest and similar type. The contractors are not bound to supply personal and consumable stores.

Particulars of the hull, machinery, etc., are given in separate preliminary specifications attached hereto. Final specifications, to be mutually agreed upon, conforming to the preliminary specifications, and following the best modern practice as to details will be prepared after Mr. Charles H. Cramp returns to America, and when signed by the representatives of both parties, the same shall become part of this contract.

Quality of Material.

ART. 2. All the materials to be used in the construction, equipment, and fittings, whether steel, timber, or otherwise, are to be of the best of their respective kinds for their respective uses and shall, in all respects, be such as shall be approved by the board of inspection appointed by the Russian ministry of marine, hereinafter referred to as the board of inspection. The said board of inspection to have permission to see the steel and other materials tested at the makers' works, before they are used in the construction of the vessel. The tensile strength, ductility, and other qualities to be in accordance with the best practice, and the figures shown in the specifications annexed hereto.

Rejected Material.

ART. 3. If any of the materials shall, before being employed in the construction of the vessel, be rejected by the said board of inspection as unfit for the purpose, the same shall be replaced, and the material so substituted shall be subjected to the like inspection, testing and rejection and to all other provisions of this contract, which are applicable thereto.

Inspection.

ART. 4. The board of inspection shall have power, at all times during the continuance of this contract, to inspect the progress of the work, both as regards the material and the construction of the vessel, either continuously, or occasionally, by any inspector or inspectors appointed and by any officers of the imperial Russian service.

The contractors engage that, during the construction and equipment of the vessel, the board of inspection shall have full liberty to enter the premises of the contractors, and any other premises upon which the machinery, parts of the hull, fittings and other appurtenances of the construction shall then be, for the purpose of inspecting the same, and the contractors engage to give every facility within their power, through themselves and all persons employed under or for them, in respect of the vessel, machinery, etc., for the due testing and survey of the materials, mode of construction, and workmanship of the vessel, machinery, etc., and every or any part thereof.

A list of the manufacturers to whom the contractors intend to give orders for materials, different appurtenances, etc., in connection with the said ship shall be previously presented to the board of inspection for approval.

All materials, fittings, and machinery, etc., (armour, plates and hull material excepted) which are to be manufactured outside
21 the contractors' dock yard shall be delivered for testing to the board of inspection at the contractors' dock yard. (It being understood that the plates and hull material shall all be manufactured at one place.)

The contractors undertake to have at their works all the facilities necessary for different tests.

The contractors will further give and supply to the said board of inspection any information they may reasonably require, and all drawings of details which they deem necessary for the inspection of the building or construction of the ship, machinery, etc., or any part or parts thereof.

Detail Working Drawings.

ART. 5. The contractors have also to supply the Russian ministry of marine with a complete set of detail working drawings of the vessel, being duplicates of those used in the construction of the ship, on the condition that the Russian ministry of marine pledge themselves to use the said drawings solely for their own information, and do not, on any pretext whatever, allow them to pass into the hands of other manufacturers.

In addition to the drawings just mentioned the contractors agree to deliver to the board of inspection the detail working drawings showing the important principal plans usually made in the beginning of the work of construction and on which the others are based, and also each and all drawings which shall be required for the construction of the vessel. Each of these drawings is to be delivered to

the board of inspection immediately after it is ready, and a copy of it is to be simultaneously posted to the ministry of marine.

Deviations or Additions.

ART. 6. No additional payment shall be made for deviations or additions of any kind, except in cases where an extra payment shall have been previously agreed to in writing.

If any of the work herein described is not carried out, a rebate of corresponding value is to be allowed to the Russian ministry of marine.

Specifications and Drawings, Engines and Equipment.

ART. 7. The vessel shall be engined and equipped in accordance with the specifications and drawings before mentioned, and signed by the representatives of both parties; and the said specifications and drawings shall be integral portions of the present contract, and everything which may be necessary as an adjunct, or necessary to perfect and complete and make effective everything coming within the scope of the specifications, although not particularly men-
22 tioned, or imperfectly or insufficiently described therein, shall be done, executed, supplied, or furnished by the contractors as if the same had been particularly specified; and the form, style, mode, or principle of construction or execution, materials and workmanship of everything connected with the said ship, whether as regards her hull, engines, machinery, rigging, furniture, and equipments, both fixed and movable, where not particularly specified or detailed, shall be of the very best quality and description, and conform to the best practice.

Speed Trials.

ART. 8. Trials to determine the speed of the vessel shall be made by the contractors, in the presence of the board of inspection, and at the cost of the contractors, who agree to insure the vessel against sea risks and all other risks of every description during the trials, and until such time as the vessel is handed over to the exclusive possession and custody of the Russian ministry of marine.

Preliminary trials under steam are to be made, to insure that the whole of the machinery is in proper working order, and fit for the official trials.

(*a.*) The speed shall be ascertained by a trial at sea of at least four (4) consecutive runs, over a measured base of about ten (10) knots, in deep water, and in a calm sea, with full power, under an air pressure not exceeding 1½ inches of water. From the four (4) runs over the measured base shall be deduced the advance per revolution, from which shall be calculated, in the usual way, the mean speed during two trials of six hours duration each, but between the two trials there shall be no adjustment of parts or cleaning of boilers.

The mean speed determined in this way is to be not less than twenty-three knots per hour.

For each quarter of a knot below the mean speed as above agreed in this contract a penalty at the rate of $50,000 (fifty thousand dollars) per quarter knot shall be deducted from the contract price.

If the mean speed fall below 22 knots but not below 21 knots, for each quarter knot an additional deduction shall be made at the rate of $35,000 (thirty-five thousand dollars) per quarter knot, and if the mean speed fall below 21 knots and not below 20 knots, the Government shall have the right to accept the vessel but at a reduction of $200,000 (two hundred thousand dollars) from the contract price, in addition to what has been deducted before.

(*b.*) Should the mean speed be less than 21 knots per hour, it shall be optional with the Russian ministry of marine to reject the ship.

(*c.*) The consumption of coal should not exceed 2 lbs. per I. H. P. per hour at full power.

A trial to determine the coal consumption to be made, in a manner satisfactory to the board of inspection.

23 (*d.*) Trials of stopping, starting, and reversing from full speed, shall be made as prescribed by the board of inspection.

There shall not be a difference of more than one foot in draft between the bow and the stern on an even keel at the normal draft under normal conditions. The mean draft shall be determined by adding the draft at the stern to the draft at the bow, and dividing the sum by two.

(*e.*) In the trials the ship's draught of water is to be designed normal draught, that is 20 feet, and not materially more, and as much less as possible with all the estimated weights on board, as stated in the specifications. In case of the actual draught of water in any part exceeding the contract draught by one foot it shall be optional on the part of the Russian ministry of marine to reject the ship.

For each inch up to twelve inches by which the actual draught will exceed the above-stated normal draught a penalty shall be deducted from the contract price as follows: For the first six inches nothing, but for each of said remaining six inches $21,000 (twenty-one thousand dollars) per inch.

If the ship should be rejected by the imperial Russian government, either for the deficient speed, or for the excess of draught above named, all payments made in respect of the rejected ship shall, within thirty days thereupon, become repayable, and shall be forthwith repaid, by the contractors to the Russian ministry of marine.

The cost of providing the coal, and loading a quantity of coal and any cargo which may be necessary to be placed on board to represent the estimated weights for the trial for speed, are to be borne by the contractors: but all coal left over the trial shall be purchased, and paid for, by the Russian ministry of marine, at the cost price to the contractors.

Defects After Delivery.

ART. 9. The contractors bind themselves, in case within twelve calendar months after delivery of the vessel there shall be found any important and materially defective workmanship or material, which had been used in the construction or equipment of any importan

part of the hull, engines or machinery, then in such case to replace such defective workmanship and material by correct workmanship and sound material, and to make such repairs at any port in Russia, or elsewhere, possessing the necessary facilities which may be selected by the Russian ministry of marine for that purpose.

Property Clause.

ART. 10. The contractors agree, that the vessel to be built, as aforesaid, whether finished or unfinished, and all steel, iron, timber and other materials as may be required by the contractors, and
24 be intended for the construction of the said ship, and which may be brought upon the premises of the contractors, shall immediately thereupon become, and be, the exclusive property of the Russian ministry of marine. The flag of the imperial Russian government shall be hoisted on the said ship, whenever desired by the board of inspection, as evidence that the same is said government's exclusive property, and the Russian ministry of marine may, at any time appoint an officer or officers to take actual possession of the said ship or material, whether finished or unfinished, subject to the lien of the contractors for any portion of the value that may be unpaid.

Firing Trials.

ART. 11. In addition to the speed trial, the firing trial, to test the structure of the vessel, shall be made at sea, and the cost of such further trial, and the insurance of the vessel in respect thereof, shall be defrayed by the contractors. The powder and ammunition for the said trial to be provided by the Russian government.

Insurance.

ART. 12. The contractors shall insure, and keep insured, against all risks usually insured against, the said vessel, its engines, and all fittings and materials at their own cost, but in the name of, and for the benefit of, the Russian ministry of marine, in fire insurance companies previously approved by the board of inspection, and in such an amount or amounts as shall be, from time to time, sufficient to cover and recoup to the imperial Russian government the sum or sums which said government, for the time being, may have paid, or become bound to pay, to the contractors in respect of such vessel.

And the policy or policies of insurance shall, if required, be deposited with the board of inspection, as soon as they are obtained, and any amount recovered, under such policy or policies, shall be applied to repair any damage in respect of which such amount shall be recovered, and the deficiency, if any shall be borne, and paid, by the contractors, who shall make good, at their own expense, all damage in excess of the amount so recovered.

And in default of the contractors so insuring and keeping insured the vessel and depositing the policy or policies if required, it shall be lawful, but not upon the Russian ministry of marine obligatory, to

insure, and keep insured in its own name, but at the cost of the contractors; and the premiums of such insurance, and all cost connected therewith, shall be deducted from the monies due or to fall due to the contractors under this contract, and, failing such deduction, the contractors agree to pay the amount thereof to the Russian ministry of marine.

Notwithstanding anything herein contained, the ship, together with its engines, machinery, and equipment, shall, as between the contractors and the Russian ministry of marine, stand, and at all times be, at the risk of the contractors, until the said ship has been accepted by the imperial Russian government, or it has taken actual possession thereof.

Completion and Delivery.

ART. 13. The contractors engage, at their own cost and risk, to launch and deliver the vessel safe and uninjured at Philadelphia, Pennsylvania, and equipped for sea, into the charge of the persons appointed by the imperial Russian government to receive it, in not more than twenty months, after the arrival of the board of inspection at Philadelphia. But due and reasonable allowance is to be made for any unavoidable delays in the completion of the speed trials, which may arise from unfavorable weather; it is, however, understood that the said allowance shall not exceed one calendar month.

Penalties.

ART. 14. In the event of the vessel not being so completed and delivered within the contract date above mentioned, and save in the case of natural phenomena, such as fire, flood, earthquake, tornado and pestilence, "*force majeure*," or strikes of workmen, the contractors engage to pay the Russian ministry of marine, a sum of one per cent. of the whole contract price, for each month or part of a month of delay.

A corresponding extension of time in consequence of a delay owing to the case of natural phenomena, "*force majeure*," &c., is to be allowed by the board of inspection.

Docking.

ART. 15. The contractors agree to cause the vessel, after final completion, and before the final delivery to the ministry of marine, to be docked and cleaned at their own cost and risk, and at any time should any contingency arise which would, in the opinion of the board of inspection, render it advisable to have the ship placed in dry-dock for survey, before being accepted by the Russian ministry of marine, the contractors are to dock the ship at their own risk and cost.

Russian Government to Have Authority to Complete.

ART. 16. The contractors agree, that in case they shall fail, or be unable, to complete, the said vessel and supply the stores and articles aforesaid, in accordance with the agreement herein contained, then, and from thenceforth, it shall be lawful for the Russian ministry of marine to cause the works herein agreed to be done, and the
26 articles to be completed and supplied by any persons, firm, or company whom the Russian ministry of marine shall see fit to employ, using therein such of the materials as the contractors shall have provided or procured for the purpose, and to pay to such persons such reasonable sums as the Russian ministry of marine shall see fit to agree upon, and in such cases the contractors shall repay, to the Russian ministry of marine, all such sums as said government shall so pay, or advance, whether the same shall, or shall not exceed what would have been payable to the contractors by the Russian ministry of marine; in that case, nevertheless, paying or allowing to the contractors, on the final completion and delivery of the vessel, the amount of the contract price hereby agreed upon, or so much thereof as shall not have been paid, or advanced by, said government to the contractors, or to the persons, firm, or company employed by the Russian ministry of marine to complete the said works, or any part thereof.

Alterations.

ART. 17. Should the Russian ministry of marine during the construction of the vessel, or the fulfilment of this contract, desire to make any alteration in the construction of the vessel, or in its arrangements, fittings, or equipment, its armaments, engines or machinery, and should such alterations be duly authorized in writing, by the board of inspection, but not otherwise, it shall be carried into execution by the contractors, within such reasonably extended time, if any, as may be approved, in writing, by the board of inspection, and if the time be extended, then this contract shall read as if the extended time had been originally mentioned therein, and if no extended time shall be so approved, then all such works and alterations shall be completed within the time above mentioned, and such alterations, if any, shall be performed, and executed in such manner as the nature of the alterations may require and as if the same had been originally mentioned herein, or in the specifications forming part hereof, and the enhancement, or reduction of cost, arising directly or indirectly therefrom, shall be valued, and if possible shall be agreed upon, by the parties hereto, and the amount of any such enhancement, if so agreed, shall be due and payable with the next instalment to fall due under this contract, or (as the case may be) the amount of any reduction, if so agreed, shall be deducted from the said instalment.

Payments.

ART. 18. The Russian ministry of marine agrees to pay to the contractors for the said vessel, complete in accordance with the specifications, and furnished with the articles specified in the lists annexed to these specifications, (exclusive of armament and torpedo outfit and their installation) the sum of — dollars, and the said amount, shall, provided the contractors shall with due diligence,
27 and to the satisfaction of the board of inspection, duly commence, and having commenced, duly proceed with the execution of this contract, be paid in accordance with the schedule annexed. The instalments shall be paid by the Russian naval attaché to the imperial Russian embassy in the United States, after he has each time received a certificate from the board of inspection stating that the work which renders the contractors entitled to receive the following instalment has been duly executed in accordance with this contract and specifications. Payments shall be made in Philadelphia in prime banker's drafts, in ten several equal instalments as hereinafter set out, except that 10 % of each of said instalments shall be withheld by the ministry of marine until the final payment is made as hereinafter provided.

1. Ten per cent. (10 %) when the material begins to come in the yard.

2. Ten per cent. (10 %) when 300 tons of material have been worked into the hull and 85 tons more are on the premises ready to go into the hull.

3. Ten per cent. (10 %) when 500 tons of material have been worked into the hull and 100 tons more are on the premises ready to be worked into the hull and one-half the cylinders are cast.

4. Ten per cent. (10 %) when 800 tons of material have been worked into the hull and 200 tons more are on the premises, all the cylinders cast and tubes and plates for drums of boilers have been received.

5. Ten per cent. (10 %) when 1,000 tons of material have been worked into the hull, 200 tons more are on the premises ready to go into the hull and half the cylinders bored, one-half the condensers cast and one-half the connecting rods, pistons and valve stems have been received in shop.

6. Ten per cent. (10 %) when 1,400 tons of material have been worked into the hull, 200 tons more are on the premises, cylinders bored, bed-plate machined, condensers cast, and the balance of the connecting and piston rods and valve stems have been received in shop.

7. Ten per cent. (10 %) when half the decks are caulked, one-half the water-tight compartments tested with water pressure and the crank shafts received in shop.

8. Ten per cent. (10 %) when three-fourths of the decks have been laid and caulked, the storerooms and magazines built and lined, one-half the cabin bulkheads in place, and the vessel successfully launched.

9. Ten per cent. (10 %) when steam has been raised in the boilers and the engines turned over under their own steam.

10. Ten per cent. (10 %) when the ship has had a successful trial trip and has been turned over to the imperial Russian government, and simultaneously therewith there shall be paid to the contractors the 10 % of each of the previous installments which shall have been withheld as aforesaid.

28 *Builder's Certificate.*

ART. 19. The contractors undertake the fulfillment of all necessary formalities, with regard to the Government of the United States, which are required by the laws of that country with reference to the building of war vessels by private firms or companies for a foreign government.

Disputes and Arbitration.

ART. 20. If at any time after the date of this contract and until the final delivery of the said ship to the Russian ministry of marine, including herein 12 months of guarantee time, any dispute or difference shall arise between the board of inspection and the contractors, it shall be referred, together with the opinion of the Russian naval attaché, as regards the matter, to his excellency, the Russian minister of marine, whose decision shall be final and without any further appeal.

Notwithstanding, however, the existence of any such dispute or difference, the contractors shall not be entitled, on any ground whatever, to withhold possession from the imperial Russian authorities of the ship, or any of its equipments, or any of the matters or things as aforesaid, whether complete or in progress, as hereinbefore provided.

Copies of Agreement.

ART. 21. The contractors undertake to provide at their expense, — printed copies of this agreement in English, and to deliver them to the Russian naval attaché in Washington.

Stamp Duty.

ART. 22. The contractors covenant and agree, that the stamp duty shall be deducted, in accordance with the laws of the Russian empire, from the first payment due to said contractors under the provisions of this agreement.

In witness whereof, the representative parties hereto, have set their hands and seals, the day and year above written. This contract being executed in English, the above text shall govern.

—— ——.

—— ——.

Signed and sealed in the presence of:

—— ——.

Preliminary Specifications.

General scheme of cruiser of 6,000 tons displacement in accordance with our letters submitted to the technical committee on March 29th and April 12th, and accepting in general the terms of the "Programme for a cruiser of 6,000 tons displacement," sent us by Chief Inspector N. Kouteynikoff under date of 13th April (1st March), 1898.

29 The general design of the hull is as follows:

1. The displacement must not be more than 6,000 tons, with normal supply of coal and other stores.

2. The metacentric height must not exceed 2½ feet when the coal is stowed in the bunkers, both above and below the water-line, and with no water ballast.

3. The hull to be constructed with double bottom and not sheathed.

4. The supply of coal to be not less than 12 per cent. of the normal displacement, and the speed must be twenty-three (23) knots during a continuous trial of twelve hours.

5. The coal-bunker capacity must be so calculated as to allow a radius of action of 5,000 knots at 10 knots speed. The coal consumption on which to base the calculation of the radius of action to be ascertained by 24 hours continuous trial; allowance being made for 8 tons per day of 24 hours for auxiliary engines, steam-heating, electric light and other ship's purposes.

6. The vessel to have twin screws and water-tube boilers of the Niclausse type.

7. The weight of spare parts for the engine (.001 tons) and machinery stores (.003 tons) must equal to .004 tons for I. H. P.

8. Evaporators ought to be in such number and of such capacity that they could, together with the constant supply of reserve fresh water fill up the loss of water in the boilers during the whole radius of action for which the maximum supply of coal will last; and the product of the evaporators must be not less than 5 % of the evaporation of all boilers in full operation. Distillers for drinking water must have a capacity of one ton every 24 hours for every 20 men. The evaporators to have reserve batteries.

9. The cruiser to have a protected deck, over which, extending the whole length of the ship, independent of the coal, must be placed cofferdams for cellulose. Conning tower to be 6 inches thick, and the protection around the base of the smokestacks of the boilers 1½ inches thick.

10. The desirable armament is as follows:

12 6-inch guns, calibre 45.
12 75 m/m guns, calibre 50.
6 47 m/m guns, Hotchkiss one barrel.

In calculating the weight of this armament the following weights of ammunition and supplies must be taken into consideration:

30 The weights are as follows:

12 6-inch guns without shields, but with accessories and mounts	150.35 tons.
6-inch ammunition, 180 rounds, for each of the above with cages	162.36 "
12 75 m/m guns with mounts, shields and accessories	27.94 "
75 m/m ammunition, 300 charges for each gun with cages	43.61 "
6 47 m/m guns, including stands, shields and accessories, with 810 charges each	21.27 "
Small arms, revolvers, and ammunition for same	5.8 "
Ammunition hoists, rails, turn-tables, electric winches	29.00 "
Total	440.34 tons.

For the proper supply of ammunition to the guns there should be—

One ammunition hoist for each 6-inch gun.

One ammunition hoist for every 4 75 m/m guns.

Two ammunition hoists for the 6 47 m/m guns.

The guns and fittings to be provided by the Russian government, but the ship to be ready in time to receive them.

11. Torpedo armament:

	Weight.
Two under-water tubes and fittings in broadside	600 poods.
Four above-water tubes and fittings of which one is on the bow and one on the stern	800 "
Fourteen Whitehead torpedoes	420 "
Thirty-five floating mines with anchors	1,050 "
Three medium-size air-compressors	105 "
Four dynamos, 640 amperes, placed above the water-line	1,600 "
Two dynamos, 320 amperes, placed above the water-line	720 "
Six search-lights	150 "
Torpedo outfit for two torpedo launches	150 "
Nets	1,200 "
Total	6,675 "
Allow for fittings and spares 20 %	1,350 "
Total	8,025 poods.
Equal to	134 tons.

31 All of the above torpedo outfit to be supplied by the Russian government; the ship to be ready in time to receive it.

12. Officers 21, petty officers 9, crew 550.

Provisions for 60 days; water for ten days.

13. Boats as follows: 2 40-ft. steam launches.
2 12-oar cutters.
1 16-oar barge.
1 14-oar working cutter.
2 6-oar whaleboats.
2 6-oar yawls.

Total ..... 10 boats.

14. Anchors, chains, etc.

Anchors of the improved Martin system or Hall, the latter with stocks. Two bower anchors, two spare anchors; two hawse pipes; two bower chains, 150 fathoms each and two spare chains 100 fathoms each.

15. Boatswain's stores, awnings, sails and outfit as usually provided.

16. Drainage system to be of the simplest possible construction; to consist of separate pumps whose pumping-out capacity in one hour's time be not less than the cubic contents of the compartments in which they are fitted; the main circulating pumps for the condensers to be adapted for pumping water out of the hold with an arrangement facilitating the turning of the outside water circulation to the circulation from the hold.

The dimensions of the ship will be—

Length between perpendiculars	400 feet
Beam	52 feet and
Draft, about	19 ft. 6 in.

The distribution of weights is about as follows:

Hull and fittings	2,900
Machinery	1,250
Ordnance	574
Outfit and stores	550
Coal 12 % of displacement	720
	6,000 tons.

32 *General Summary of Work Pertaining to Hull.*

The hull to be built, launched, fitted, and made complete in all respects, with cabins, ward-room, state-rooms, pantries, storerooms, magazines, shell-rooms, bath-rooms, water-closets, complete steering, pumping and ventilating arrangements, steel masts and tops, stepping, securing and coating the same; also wood topmasts, and all forgings, etc., in connection therewith for the proper securing of the rigging, etc., all articles of equipment, anchors and chains, spars, awnings, sails, standing and running rigging, blocks, boats, galleys, portable furniture, mattresses, oilcloths, carpets, curtains, and fixtures to same; electric call bells, speaking tubes, telephones, etc., all necessary appliances for handling, stowing and securing anchors,

chains, hawsers, and boats, including steam windlass, steam winches and capstans; water and oil tanks, fitting and stowing the same; and prepare for the reception of torpedo armament and gun mounts and appliances.

Articles to be Furnished by the Government.

Ordnance and outfits, guns and gun mounts, turret installation and gear and motive power, torpedo armament, Russian stoves, and all other matters that the Russian government usually furnishes.

Engines.

Engines will be twin-screw, rights and lefts, placed in water-tight compartments separated by middle-line bulkhead; they will be of the vertical, inverted-cylinder, direct-acting, four-cylinder, triple-expansion type, and equal to the best engines that the William Cramp & Sons Ship and Engine Building Company has constructed for war vessels, and to be of sufficient power to secure an easy performance of a 23-knot speed in the ship.

In general details, character of the work and materials, to be equal to and in conformity with the best engines that the company has furnished to the United States and other governments.

The boilers will be of the Niclausse type and sufficiently large to supply with ease the engines.

The engines and boilers will be furnished with the usual appliance for spares, spare parts and auxiliary engines.

They will have the usual steam-reversing gear, ash hoists, coal-hoisting winches, turning engines, auxiliary pumps, engine-room ventilating fans, engines for workshop machinery, pumping appliances for various purposes, distilling and evaporating apparatus, (as per programme), manganese bronze propeller blades, and such other auxiliary or supplementary machinery, tools, instruments or apparatus as are usually supplied to vessels of this description by the William Cramp & Sons Ship and Engine Building Company.

33 *Opinions of the Court.*

And afterwards, upon the 12th day of July, A. D. 1900, the opinion of the court being filed, is in the words and figures following, to wit:

United States District Court, Eastern District of Pennsylvania.

UNITED STATES *ex Relatione* LEO ALEXANDROFF
vs.
ROBERT C. MOTHERWELL, Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag."

Habeas corpus.

MCPHERSON, *J.*:

The relator, who is conceded to be a deserter from the Russian naval service, is confined in the jail of this county by virtue of a commitment issued by a United States commissioner under section 5280 of the Revised Statutes. This section provides the legal machinery for the arrest of deserting seamen and for the delivery of such offenders to the consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting. The proceedings before the commissioner were formally regular, and the testimony taken upon the hearing of this writ of *habeas corpus* discloses no dispute of fact.

The single question for decision is whether article IX of the treaty with Russia, concluded in December, 1832, under which the arrest was made, justifies the prisoner's detention.

The facts are these: The prisoner is a conscript member of the Russian navy whose term of service has not expired, his duty being to care for the sick as an assistant physician.

In the fall of last year he was ordered, and thereupon proceeded, to Philadelphia as one of a squad of seamen who were intended to become part of the crew of the "Variag," a cruiser then and now in course of construction at the ship yard of Cramp and Sons in this city. The vessel is being built under a contract with the Russian government and is nearing completion, but she has not yet been accepted by the Russian authorities.

The prisoner has never been on board of her, and there is no proof that her crew has ever been organized. Not long ago
34 the prisoner deserted the service and took up his residence in the city of New York, where he was arrested upon the written request of the Russian vice-consul at Philadelphia.

Article IX of the treaty is as follows:

"The said consuls, vice-consuls, and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers and shall in writing demand such deserters, proving by the exhibition of the registers of vessels, the rolls of the crews, or by other official documents that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused."

Upon these facts, I do not think that discussion is needed. It seems to me to be clear that the prisoner does not fall within the treaty. For this decision there are three reasons:

First. The "Variag" is not yet a Russian ship of war. She is an unfinished vessel, intended no doubt to become a Russian cruiser, but she has not yet acquired, and she may never acquire that character.

Second. The prisoner is not yet a member of her crew. So far as disclosed by the evidence the vessel has no such organization in the sense intended by the treaty. The prisoner and certain associates were ordered to Philadelphia to serve as part of the cruiser's complement but they have not yet begun that service, and may never be called upon to perform it.

Third. Even if it be assumed that the prisoner may be treated in this proceeding as a member of a crew because the Russian government intended that he should hereafter take upon him such a status, the kind of proof required by the treaty to prove his status has not been offered. No register, or roll of the crew, or other official document substantiating the vice-consul's averment has been produced; and, therefore, the evidence specifically described and made necessary by the treaty itself, has not been produced.

It follows that no legal justification for the prisoner's detention has been shown, and that he must be released from custody.

It is proper to add that while this conclusion seems to me to be unavoidable I have reached it with some reluctance. The prisoner is a deserter from the naval service of his country, and I do not regard his abandonment of duty with favor. So far as appears, he has violated a high obligation without sufficient justification, and nothing but a clear conviction of the limited scope of the treaty constrains me to stand between him and the punishment that he apparently deserves. The courts of the United States are
35 bound, and will no doubt always be ready to enforce the treaty stipulations of this Government with a friendly nation; but they are equally bound to adhere to the terms of such stipulations, and to go no farther than the contracting powers have themselves seen proper to direct.

Obviously such a situation as is now presented was not foreseen seventy years ago.

The article in question is dealing with completed vessels, manned by organized crews, that may be visiting the ports of the foreign power and to that subject its provisions must be confined.

It is accordingly ordered that the prisoner be discharged from custody.

And thereupon the respondents, by John F. Lewis, Esq., their counsel, present a petition for leave to appeal from the decree of the court in this cause to the next United States circuit court of appeals for the third circuit, with an assignment of errors, and the said petition and assignment being filed are in the words and figures following, to wit:

Petition for Appeal.

United States Circuit Court of Appeals for the Third Circuit.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag," Appellants,
vs.
UNITED STATES OF AMERICA *ex Relatione* LEO ALEXANDROFF, Appellee.

Sur proceedings in the district court of the United States for the eastern district of Pennsylvania upon petition of Leo Alexandroff for a writ of *habeas corpus.*

The above-named Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," conceiving that they are aggrieved by the decision entered on the 12th day of July, A. D. 1900, in the above-entitled case, hereby appeal from the said decision to the United States circuit court of appeals for the third circuit, and it is prayed that this appeal may be allowed and a transcript of the record and proceedings and papers upon which said decision was made, duly authenticated, may be sent to the United States circuit court of appeals for the third circuit.

JOHN F. LEWIS,
Attorney for Appellants.

CAPTAIN V. BEHR,
Commanding Cruiser "Variag."

36 UNITED STATES OF AMERICA, } ss:
Eastern District of Pennsylvania, }

Vladimir Behr being duly sworn according to law deposes and says that he is one of the appellants above named, that the facts stated in said appeal are true and that said appeal is not taken for delay.

VLADIMIR BEHR.

Sworn — and subscribed before me this 12th day of July, A. D. 1900.

CHARLES S. LINCOLN,
Clerk Dist. Ct. U. States.

Assignments of Error.

And now, to wit, July 12, 1900, the appellants file their assignments of error in the above cause and assign for error therein as follows, to wit:

1. The learned judge erred in holding that the "Variag" was not a Russian ship of war.

2. The learned judge erred in holding that the prisoner was not a member of her crew.

3. The learned judge erred in holding that the kind of proof required by the treaty with Russia had not been offered.

4. The learned judge erred in not remanding the prisoner to custody.

5. The learned judge erred in discharging the prisoner from custody.

JOHN F. LEWIS,
Attorney for Appellants.

June 12, 1900.

And the appeal is allowed upon the usual conditions.

And it is ordered that the relator be required to enter recognizance with surety in the sum of two hundred dollars, conditioned for his appearance at the district court upon the determination of the proceedings under said appeal, to await the further order of the court.

Bond on Appeal.

Know all men by these presents, that the Merchants' Trust Company, having its office at Nos. 611 and 613 Chestnut street, in the city of Philadelphia, and State of Pennsylvania, is held and
37 firmly bound unto Leo Alexandroff, relator in certain proceedings on petition for *habeas corpus* in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to the said Leo Alexandroff, to which payment well and truly to be made the said The Merchants' Trust Company binds itself and its successors, firmly by these presents.

Sealed with its seal and dated at Philadelphia, this twelfth day of July A. D. one thousand nine hundred.

Whereas, Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," respondent under said petition for *habeas corpus* have lately appealed to the United States circuit court of appeals, for the third circuit from the decree of the Honorable John B. McPherson, judge of the district court of the United States, for the eastern district of Pennsylvania, made and pronounced in the aforesaid proceedings had under the petition for *habeas corpus* therein lately depending between the said Leo Alexandroff, relator, appellee, and Robert C. Motherwell, Jr., keeper of the Philadelphia county prison and Captain Vladimir Behr, master of the Russian cruiser "Variag," respondents appellants.

Now, if the said appellants shall prosecute *its* appeal to effect and answer all damages and costs if *it* fail to make *its* plea good, then this stipulation shall be void, otherwise to be and remain in full force and virtue.

MERCHANTS' TRUST COMPANY. [SEAL.]
JOHN F. LEWIS, *Vice-President.*
Attest: ROB'T M. EARLY, *Secretary.*

Taken and subscribed before me this twelfth day of July, A. D. 1900.

CHARLES S. LINCOLN,
Clerk District Court.

Sealed and delivered in the presence of—
CHARLES S. LINCOLN.
WM. W. CRAIG.

38 *Recognizance of Defendant and Surety.*

UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

We, Leo Alexandroff, residing in St. Petersburg, Russia, and The City Trust, Safe Deposit and Surety Company of Philadelphia, No. 927 Chestnut street, in the city of Philadelphia, and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America, in the sum of two hundred dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Leo Alexandroff, relator in certain proceedings on petition for writ of *habeas corpus*, against Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," lately pending in the district court of the United States for the eastern district of Pennsylvania, shall be and appear at the district court of the United States, for the eastern district of Pennsylvania, upon the determination of an appeal taken by the said respondents, to the United States circuit court of appeals for the third circuit, from the decree of the district court in said proceedings, discharging the relator, and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the said court of appeals or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

L. ALEXANDROFF. [SEAL.]
THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, [SEAL.]
By JOS. A. SIMS, *2d Vice-President.*
Attest: JAS. F. LYND, *Secretary.* [SEAL.]

Taken, acknowledged and subscribed this 13th day of July, A. D. 1900 in open court.

WM. W. CRAIG,
Clerk District Court.

(Internal rev. stamp, 5 cents.)

And thereupon the relator is discharged from present custody.

39 UNITED STATES OF AMERICA, } ss:
Eastern District of Pennsylvania, }

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the foregoing is a true and faithful copy of the record and proceedings in the said court, in a certain cause therein lately depending; to wit: "The United States of America, *ex relatione,* Leo Alexandroff, against Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser 'Variag.' Proceedings on petition for writ of *habeas corpus* of May sessions, 1900, as full and entire as the same now remain among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said district court at Philadelphia, this tenth day of August, A. D. 1900, and in the 125th year of the Independence of the United States.

[SEAL.] WM. W. CRAIG,
Deputy Clerk District Court United States, Eastern District of Pennsylvania.

39*a* United States Circuit Court of Appeals, Third Circuit, September Term, 1900.

"THE KEEPER OF THE PHILADELPHIA COUNTY PRISON and Captain Vladimir Behr, Master of the Russian Cruiser 'Variag,' Appellants,

v.

THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

And now, to wit, this first day of October, A. D. 1900, comes James B. Holland, Esquire, United States attorney for the eastern district of Pennsylvania, at the instance of the executive department of the Government of the United States, and filed of record a suggestion as follows:

Inasmuch as it appears by the record in the above-entitled cause, that Leo Alexandroff, the relator, is a subject and citizen of the Empire of Russia and enrolled in the naval service of his country
39*b* as an assistant physician; that he came to the United States, together with fifty-two other men, under the charge of an officer of the Russian imperial marine, detailed for the purpose of manning the cruiser 'Variag,' a vessel under construction for the Russian government by the William Cramp Ship and Engine Building Company of Philadelphia; that prior to the arrival of the said officer and men and in pursuance of correspondence with the Russian ambassador, instructions were issued by the Secretary of the Treasury at Washington to the commissioner of immigration at New York, admitting the said officer and his subordinates for the purpose of partially manning the cruiser, and inasmuch as the said Leo Alexandroff remained in the Russian naval service after his

arrival in the United States until April 20, 1900, when he deserted, lived a week in Philadelphia and then went to New York, where he was apprehended by Captain Vladimir Behr, master of the 'Variag,' brought to Philadelphia and confined in the county prison for safe keeping, and inasmuch as his period of enlistment in the Russian imperial service was for six years from 1896, and in pursuance of said enlistment he left Russia for America, knowing he was to become one of the crew of the newly constructed cruiser and for that purpose alone, and upon his arrival here and until he deserted, lived with the other members of his company, was supported by the Russian government and received wages for his services as a member of her crew, and inasmuch as it further appears by the record in the above-entitled cause that the said cruiser 'Variag' was built under written contract between the Russian government and the Cramp Company, which provided among other things, as reference to the said record will more fully and at large appear, that the said vessel and all materials entering into her or intended for her construction should become and be the exclusive property of the Russian ministry of marine, and inasmuch further, as there exists between the United States of America and His Majesty, the Emperor of Russia, a state of peace and amity, and inasmuch as it does not appear but that the said officer having in charge the relator and the other sailors he brought to this country has conformed
39c in all things to the law of nations and the laws of the United States, and his authority over and custody and control of the said relator should not be interfered with directly or indirectly by the Government of the United States or by any of the courts created in pursuance thereof, it is respectfully suggested to the honorable, the judges of the circuit court of appeals for the third circuit, that Leo Alexandroff, the relator, should be remanded to the custody of the keeper of the county prison at Philadelphia, to await the order of Captain Vladimir Behr, the master of said cruiser 'Variag.'

JAMES B. HOLLAND,
United States Attorney."

40 And afterwards, to wit, on the first day of October, A. D. 1900, this cause being called for argument on the transcript of record from the district court of the United States for the eastern district of Pennsylvania, before Hon. George M. Dallas and Hon. George Gray, circuit judges, and Hon. Edward G. Bradford, district judge, and being argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the twenty-fifth day of February, A. D. 1901, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinions, to wit:

41 In the United States Circuit Court of Appeals for the Third Circuit.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,

v.

THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

Before Dallas and Gray, circuit judges, and Bradford, district judge.

DALLAS, *J.:*

Leo Alexandroff came to this country in October, 1899, in company with fifty-three men and an officer, all of whom, as well as himself, were members of the Russian navy. They were sent here to form part of the crew of the cruiser "Variag," which was then in course of construction for the Russian government at the city of Philadelphia. The vessel was nearing completion, but was still on the stocks and had not been accepted, when Alexandroff, who had not been aboard of her, went, without leave, from Philadelphia to the city of New York, where he soon obtained employment and *formerly* declared his intention to become a citizen of the United States. Having thus manifested his purpose to renounce the service in which he was enrolled, he was arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed by a United States commissioner to the prison of Philadelphia county, upon a mittimus which recited that the cause of his commitment was "desertion from the imperial Russian cruiser Variag," and that he had been apprehended upon the "complaint of the captain of the said cruiser Variag, in accordance with the terms of the treaty between the United States and Russia." Thereupon a writ of *habeas corpus* for his production was allowed by and issued out of the district court of the United States for the eastern district of Pennsylvania. It was directed to the keeper of the prison, and to "Captain Vladimir Behr, master of the Russian cruiser Variag," but the only return thereto was made by the former, who produced the prisoner and submitted a copy of the commissioner's precept.

But a single question was argued and decided in the court
42 below, namely, "whether article IX of the treaty with Russia, signed in December, 1832, under which the arrest was made, justified the prisoner's detention." The learned district judge was of opinion that it did not, and we concur in his conclusion. The clause referred to is as follows:

"The said consuls, vice-consuls and commercial agents are authorized to require the assistance of the local authorities for search, arrest, detention and imprisonment of the deserters from ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers and shall in writing demand such deserters, proving by the exhibition of the registers of vessels, the rolls of the crew, or by other official documents that such individuals formed part of the

crew; and this reclamation being thus substantiated, the surrender shall not be refused."

The Federal courts should, of course, unhesitatingly and with scrupulous fidelity, exercise any jurisdiction they possess to effectuate the treaty obligations of the United States. But the scope of such obligations, as of ordinary contractual engagements, is to be determined by the terms of the instrument creating them, and by no reasonable construction of the article in question can it be made to comprise any undertaking with respect to deserters generally. On the contrary, deserters from ships of war and merchant vessels are distinctly specified, and therefore to such deserters only can the mutual stipulations of the contracting governments be related. *Expressio unius est exclusio alterius.* If more had been intended, less would have been said; but it is in reality manifest that such an event as we are now concerned with was not contemplated at all, for it could not then have been anticipated that the circumstances necessary to its occurrence would ever arise. As was said by the learned judge below, "The article in question is dealing with completed vessels, manned by organized crews, that may be visiting the ports of the foreign power, and to that subject its provisions must be confined." The unfinished Variag was not a "ship" in the sense in which that word was used in the treaty. Completed ships were exclusively in mind. This, we think, is evident from the whole tenor of the article, and is made
43 especially apparent by its precision for proof by documents, which ordinarily pertain to perfected and entire vessels only. She certainly had not become a Russian ship, for under the contract for her construction the Russian government might still have rejected her. Moreover, it is hardly supposable that she would in her then condition and situation have had a crew, and the fact is that she had none. A number of men had been assigned for that service, but as they had not entered upon it, there was, as yet, no crew in being, and Alexandroff's abandonment of those who were to form part of the projected crew cannot be said to have been a deserter "from the ship," for the undisputed evidence is that he had not at any time been aboard of her. The conclusion seems to be inevitable that the learned district judge was right in holding that the treaty under which the arrest was made did not justify it; but it is now further contended that as an act of comity, irrespective of the treaty, an order should have been made for the surrender of Alexandroff to the Russian vice-consul or to Captain Behr, and this contention has had our careful consideration.

In proceedings upon *habeas corpus* the authority of the courts of the United States is not so restricted as to compel them, in every instance, either to discharge the prisoner absolutely or to remand him to the custody of the person producing him. These courts, at least, are empowered and require- to "dispose of the party as law and justice require" (R. S., sec. 761); and if, under the law of nations and the facts of this case, any representative of the Russian government was entitled to have Alexandroff delivered to him we do not doubt that he should have been so dis-

posed of, and hence we are brought to inquire whether under any rule of comity, having the force of law and therefore judicially cognizable, such delivery was demandable. In dealing with this question we will assume the correctness of the proposition that, where sufficient ground for his detention
44 is shown, a prisoner is not to be discharged for defects in the original arrest or commitment; but we cannot accede to the theory advanced in argument that the keeper of the county prison in detaining Alexandroff was acting as the agent of Captain Behr. He had no right to deprive him of his personal liberty upon the mere behest of any man, and it would be unjust to ascribe to him the arrogation of any such right. He detained the prisoner by virtue of a warrant issued by a public officer in seeming conformity with law, and that warrant and nothing else was set up in justification. It did, it is true, direct that the prisoner, unless discharged by due course of law, should be kept "subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser Variag," but this direction did not constitute the jailor the agent of either of those persons. It correctly defined the duty which would have devolved upon him if the commitment had been rightfully made under the treaty of 1832, but as it was not, the direction which was given in supposed compliance with that treaty was simply inapposite and of no effect whatever. The situation, then, was in fact and in law this: Alexandroff was neither in the actual custody of Captain Behr nor under his control. He was detained solely and exclusively by the keeper of the prison, and Captain Behr's inclusion in the writ of *habeas corpus* was unnecessary and redundant. He was not required to answer it, and upon the hearing it appeared that no order for the prisoner's discharge could with propriety or efficacy have been directed to him. In fact he was not ordered to do anything whatsoever. His real position therefore was not that of a defendant who is constrained to respond to a demand, but of an intervenor who himself asks the action of the court for the maintainence of a right to which he claims he is entitled. Consequently the precise question is not as to whether the courts of this country should compel an officer of a foreign navy to release a man who had come here under his command, but as to the right of such offi-
45 cer to require their assistance for the recapture of a deserter. From first to last this right has been asserted and insisted upon, and if Alexandroff had been a member of a crew and had deserted from a Russian ship, its existence would be freely granted, for with respect to "such deserters" it was unquestionably established by the treaty which has been discussed. But it is difficult to understand why the provision of that instrument requiring the local authorities, including judges, to surrender deserters should have been confined to deserters from ships of war and merchant vessels if, as is now contended, the law of nations had already imposed upon the courts the duty of surrendering all naval deserters whether from ships of war or not. "Treaties are usually allied with a change of law" (Hall's Int. Law, 4th ed., 12), and it is plain, we think, that the particular article under consideration was intended to create a new

obligation, and not merely to prescribe how a subsisting one should (in certain only of the cases covered by it) be performed. Congress has quite distinctly indicated that its understanding of the matter accords with our own, for in declaring the duties of the courts upon the subject it has expressly restricted the applications upon which their interposition may be required to such as may be made on behalf of "any foreign government having a treaty with the United States" (R. S., sec. 5280), and, in our opinion, this restriction does not conflict with any duty imposed by international law.

That the public vessels of a State are exempt from attachment or arrest under the municipal law of a foreign nation, even when found in waters within its jurisdiction, must be acknowledged (Exchange *v.* McFadden, 7 Cr., 116), and "it is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it by permission of its government or sover-ign, is exempt from the civil and criminal jurisdiction of the place" (Coleman *v.* Tennessee, 97 U. S., 509). But neither of these immunities is now in question. Neither of
46 them has been invaded. Neither of them is impugned. No attempt has been made to subject a Russian vessel to any process of our courts, nor has exemption from their jurisdiction been denied to any member of the Russian army or navy. Alexandroff was arrested in pursuance of a request made by the Russian vice-consul himself, and he was not in the custody of Captain Behr at the time of his discharge. Consequently, neither the vice-consul nor Captain Behr was, at any stage or in any manner, coerced by or under the authority of the United States. The commitment was made upon the assumption that it was called for by the treaty of 1832, and when it appeared to the court inquiring "into the cause of restraint of liberty" (R. S., sec. 752), that this assumption was an erroneous one, it became the plain and imperative duty of that court, in the absence of any other ground for detaining the prisoner, to order his release. We agree that the application for his delivery to Captain Behr legitimately presented a cognizable demand; but upon such an application, the party making it—who seeks the judgment of the court in his favor—becomes the actor. He invites the exercise of its jurisdiction. It is not imposed upon him. Furthermore, the rule of comity which accords to an army of one nation, when within the territory of another by its permission, the privilege which is here asserted is not, in our opinion, pertinent to this case. We do not doubt that it is applicable to a marine force as well as to a land force, but, as to either, it respects organized bodies only. A single regiment or a single crew, for instance, may be entitled to its allowance, but exemption from compliance with the law of the land is not to be conceded to any man or number of men merely because he or they happen to be in the military or naval service of a foreign State. Captain Behr and those who came with him were members of the Russian navy, but as an aggregation they were not an integral component of it. It was intended that they

should become part of an organization which was to
47 be comprised in that navy, but that organization was still unformed. The men were by Russian law subject to the captain's control, but this did not of itself make them when conjointly considered a constituent unit of the Russian navy, for at the time in question no such unification had been effected. If there had been but two or three instead of more than fifty men under his command, it could hardly have been argued, we think, that they and he should for the present purpose be regarded as representative of the Russian navy, and surely the existence or non-existence of such representative character cannot be dependent upon the number of persons who may be alleged to be clothed with it. The true criterion rests upon the obvious distinction between the concrete parts into which a navy is usually divided and its individual members. The former stand for the navy; the latter do not. The individuals who were detailed for the purpose of partially manning the Variag were not marching through this country, nor were they, in the ordinary sense of the word, stationed here. If the Russian government had requested their recognition and admission as a distinctive part of its navy, and that request had been acceded to by the Executive Department of our Government, a different situation would have been presented, with respect to which we need express no opinion, for the fact *fact* is that no permission for their landing was either asked or given, and we have not been persuaded that any one concerned supposed it to be requisite or had any thought of invoking or conceding any immunity which might have accrued from it. The Treasury Department, by its letter of October 4, 1899, did not assume to confer or define any privileges other than those which were mentioned in it. The Russian ambassador, to whom it was probably addressed, was merely informed that the usual examination would be waived, and that no head tax would be demanded, and it is simply impossible to infer from this relinquishment of those particular exactions that it was either
48 intended or understood that the persons referred to were, after landing, to be regarded as or treated like a foreign army. Such effect could not be attributed to that communication without grossly perverting its plain meaning and transforming an act of common courtesy on the part of the Treasury Department with relation to matters within its province into an international compact which it would have no authority whatever to make.

The learned district attorney for the eastern district of Pennsylvania, acting by executive authority, has suggested in writing that Alexandroff should be remanded to the county prison to await the orders of Captain Behr. This suggestion will now be filed in the office of the clerk of this court, but as it is not, in our opinion, well founded in law, it necessarily results that it cannot prevail. It presents no facts which do not appear upon the record before us, and the legal effect of those facts *are* for determination exclusively by the court. The present case is not in this respect at all like that of "The Exchange," which Marshall, C. J., observed: "If this opinion be correct, there seems to be a necessity for admitting that the fact

might be disclosed to the court by the suggestion of the attorney for the United States."

We have reached the conclusion that neither the treaty, which was at first relied on, nor the rule of comity, which has since been pressed upon our attention, is applicable to the facts now presented, and therefore the order which was made by the district court must be and is affirmed.

49 In the United States Circuit Court of Appeals for the Third Circuit.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,
v.
THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

Appeal from the district court of the United States for the district of Pennsylvania.

Before Dallas and Gray, circuit judges, and Bradford, district judge.

GRAY, *J.*:

Although I agree in the conclusion reached by Judge Dallas, I deem it necessary to state, as briefly as possible, the grounds upon which I hold that the relator should be discharged.

The learned judge of the court below was undoubtedly right, as the case was presented to him, in declining to hold Alexandroff and in ordering his discharge. We surrender deserting seamen from foreign vessels, whether of war or of merchant marine, only under the obligation of treaties (Moore on Extradition, vol. 1, p. 612, sec. 408), and it was under the provisions of our treaty with Russia in that regard that it was claimed that Alexandroff was arrested and held subject to the order and requisition of Captain Behr, who was in command of the detail of men belonging to the Russian navy and awaiting the completion of the ship of war "Variag," then on the stocks at Cramp's ship yards, in Philadelphia. That his arrest and detention, under color of process issued in pursuance of the stipulation of said treaty and of the act of Congress passed to carry out the same, was unjustified and illegal has been fully and clearly shown in the principal opinion in this case. It is also clear, as stated in that opinion, that under the provisions of section 761 of the Revised Statutes the court below were not constrained to set the relator at liberty, even though the particular proceedings and commitment pursuant thereto by which he was held were un-
50 warranted and illegal. If, under the obligations of public law or of comity usually exercised between friendly nations, there was a duty on the part of the Government of the United States to aid Captain Behr in the capture of a deserter from his force, or to recognize the right of the commander of that force, in the exercise

of military discipline, to cause his forcible arrest and detention by those under his command, it would have been the judicial duty of the court below to surrender the relator into the custody of the commander of that force, notwithstanding the indefensibility of the particular proceedings under which he was arrested. No claim on this ground appears to have been urged at the hearing of the cause in the court below.

Notwithstanding this, we agree in holding that this contention may be made upon proper grounds before this court, and, if sustained, this court would be authorized to and should reverse the judgment of the court below and order the relator to be delivered to the custody of the commanding officer of the Russian naval force. Accordingly, it has been urged with force and ability in the argument of this appeal that Alexandroff was a member of a detail of the military forces of the Czar of Russia; that, organized as such under command of proper officers, this military detail came to this country to form part of the crew of a Russian man-of-war, then building for the Russian government, at Philadelphia, and proceeded from the port of debarkation to that city, there to await the completion of the ship which they were intended to man. The claim is made that, under the rules of international law, this force was entitled to have extended to it the comity which is due where the army or an organized portion of the military force of one sovereign enters upon or crosses the soil of another with the permission of the latter. It is true that if such permission is given, then there is implied a right or privilege in the commander of such organized military body to enforce discipline, which would include the right to arrest and detain a deserter, and also to be exempt from operation
51 of the civil and criminal laws of the country through which he is passing or in which he is remaining; but while this comity and these privileges and immunities flow from and are implied in such a permission from the sovereign of the soil and do not require to be distinctly enumerated or stated, it is also true that the permission of such sovereign must be express and is not to be implied. This seems the settled doctrine founded on the opinion of Chief Justice Marshall in the celebrated case of "The Exchange" (7 Cranch), which has not only stated but has become the received expression of international law on this subject.

While it is usual to speak of the "armies" of one sovereign crossing or remaining upon the soil of another, with the permission of the latter, as entitled to this comity, there is nothing in the reason of the rule or of the authorities in support of it which would deny this comity to any organized military force, however small, provided it was large enough to be susceptible of military organization and of acting offensively or defensively. In this case, therefore, I am of opinion that the detail of fifty-eight men, if organized as part of the military and naval force of Russia, coming here for the purpose disclosed in the record, might sufficiently possess the character that would, so far as this case is concerned, be entitled to receive and enjoy the comity and privileges flowing from such a permission as we have already described if properly granted by our Government

The record, however, is fatally defective in that it does not disclose the absolutely essential fact that permission was given to such a force or to the representative of its sovereign to enter this country as an organized military body. In a matter so important as the assertion of the sovereignty of another country upon our soil, nothing but the clearest evidence of that executive permission from our Government which international law demands as a prerequi-
52 site to the enjoyment of those privileges which flow from comity will justify the assertion of such a claim. When asked for the evidence of such executive permission we are pointed by the appellants to the record for a copy of the letter of the acting Secretary of the Treasury, dated October 4th, 1899:

"No. 19805. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 4, 1899.

SIR: Acknowledging the receipt of your letter of 24th ultimo, No. 557, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York to admit without examination the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard in Philadelphia, Pennsylvania.

The collector of customs has also been advised that the usual head tax of $1.00 is not to be collected in this case.

Respectfully yours, O. L. SPAULDING,
Acting Secretary, T. U. S."

This letter, it will be observed, has no address, and there is nothing in the record to show to whom it was written. We are told by counsel, and it seems to be assumed, that it was written to the Russian ambassador, but even when we assume this it falls far short of conveying to this court the information that is absolutely necessary for the contention of the appellants in this case, to wit, that the requisite permission was granted by the President to the Russian government to land, march across our country, and indefinitely hold therein a military force of the Czar of Russia. Whether they were admitted as a military organization or not, they clearly were not immigrants, and therefore not amenable to the immigration inspection laws nor to the head tax imposed and collected by the customs authorities from immigrants. The same response would have been made as to any civil employees of the Russian government coming here temporarily in the government service. There is no evidence whatever that more was intended on either side. The evidence is quite the other way. It does not appear what the request of the Russian ambassador was to which this letter is said to be a
53 reply. The wording of the Treasury Department's letter does not necessarily imply a request from the Russian government that these men should be permitted to land as a military

force. For an illustration of how information from the Executive is conveyed through the Secretary of State in direct and categorical terms, see letter of Mr. Webster, Secretary of State, to Mr. Crittenden, Attorney General, March 15th, 1841, in the case of Alexander McLeod, 6 Webster's Works, 262, and it is to be observed that where the Executive permission in question is given it is given by the President, through the Secretary of State, who is the sole organ of Executive authority for communication with foreign powers.

But reliance is also placed upon a matter that does not belong to the record and forms no part of the proceedings in the court below. We refer to the suggestion made in this court for the first time by the district attorney of the United States for the eastern district of Pennsylvania. It is claimed that this suggestion, purporting to be made by the direction of the Executive authority of the United States, is binding upon this court. We do not deny that a suggestion so made by the proper law officer, representing in that regard the Executive, might be an appropriate vehicle to convey from the Executive to this court information of the fact, if fact it be, that this detail of men from the Russian navy, under Captain Behr, had received the permission of the Executive of this country to land at New York, cross over to Philadelphia, and there remain as a part of the organized military force of the Czar of Russia. It may be admitted that direct and positive information so given would conclude this court as to the question of fact, which was the subject of such information, and thus change the aspect under which we are now compelled to view the case, but no such information from the Executive was conveyed or attempted to be conveyed by the suggestion filed. The district attorney merely undertakes,
54 in obedience to the stated direction of the Executive, to call the attention of this court to the facts disclosed in the record, and to state argumentatively a construction which he thinks should be placed thereon. The interpretation of the record in this case is the function of the court, and not of the Executive, and the suggestion is in this respect irrelevant. The suggestion of the district attorney, as we have seen, does not disclose the fact of any permission having been given by the Executive to the Russian authorities to land and maintain this detail of men as a military organization of the Russian government. It does not even expressly state that the Executive of the United States, because of the facts recited from the record, recognize- the naval detail under Captain Behr as an organized military force, present on our soil by the requisite permission of the Executive authority of this country.

International law does not sanction the intrusion of the military forces of one sover-ign upon the soil of another by any implied permission of the latter. The presence of such an armed body is so serious and important a matter, involving, as it does, a diminution of the sover-ignty of a country whose soil is thus occupied, that nothing but express permission from the sover-ign of such country can justify it. Without permission, such intrusion is a hostile act, and would have to be defended by the sover-ign of such troops as an act of war or as justified by some supreme necessity,

which comity would require to be accepted as an excuse. It is true that a different rule obtains in the case of the ships of war of one sover-ign visiting the ports and waters of another. There is an implied authority among nations to tolerate this, and extend to such visits an international comity, founded on universal custom and usage among nations. This difference results obviously from the different nature of the intrusion in the one case from that in the other.

Ships of war, from their vagrant character, constantly demand
55 the hospitality of foreign waters. They were made to traverse the waters of the world, and all nations find that their interests and security demand free ingress to and egress from the ports of friendly nations. The character of their operations and activities differ as widely from those of an army as the sea does from the land. Yet, as we have seen, deserters from such ships in a foreign port, though there by the implied permission of its sover-ign, cannot be recaptured, except in pursuance of the stipulations of a treaty, nor can the rule of comity here in question be invoked for such a ship's company or a portion thereof when landed on foreign soil. The permission implied in case of the ship of war does not extend to the crew or ship's company when landed. When they go ashore, even as an organized body, they ordinarily become subject to the local laws.

I am of opinion, therefore, that there is no evidence either in the record of this case or in the suggestion filed by the district attorney that the permission of the Executive, requisite to invoke the exercise of the comity claimed, was ever granted to the Russian government or its representative in respect to this detail of men under Captain Behr.

56 In the United States Circuit Court of Appeals for the Third Circuit.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,

v.

THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

BRADFORD, district judge, dissenting:

I dissent from the judgment of the court in this case on the ground that, in my opinion, by the principles of international comity as recognized in this country and declared by the Supreme Court, Captain Behr has a right to exercise discipline over the Russian naval force which came to this country in his charge, including the power to arrest and have custody of Leo Alexandroff, the relator, as a deserter. This ground was not discussed or even considered by the learned judge who decided the case in the court below;

nor am I aware that it was presented to him in argument. He said:

"The single question for decision is whether article IX of the treaty with Russia, concluded in December, 1832, under which the arrest was made, justifies the prisoner's detention."

If the case had involved only the point on which it was decided below, there could be little doubt as to the correctness of the decision, but in this court it has been presented in a new and very different aspect. The record shows that the relator and the other Russian sailors under command of Captain Behr came to this country as members of the Russian navy, under orders to form part of the crew of the cruiser Variag, a war vessel then in course of construction for the Russian government at the ship yard of the William Cramp & Sons' Ship & Engine Building Company, in Philadelphia, under a contract between that company and the
57 Russian ministry of marine. The men composing this detail were subjects of Russia and in the service and pay of Russia, formed part of the military force of that empire, came to this country in a body under military discipline, and in a body entered on our coil, not as private individuals severally bound on business or pleasure, but for the specific and strictly public purpose of manning a cruiser about to be turned over to the Russian government. The broad principles which should be determinative of this case are stated with admirable clearness and force in Schooner Exchange v. M'Fadden, 7 Cr., 116. Chief Justice Marshall, delivering the opinion of the court, said:

"The world being composed of distinct sover-ignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity distates and its wants require, all sover-igns have consented to a relaxation in practice in cases under certain peculiar circumstances of that absolute and complete jurisdiction within their respective territories which sover-ignty confers. * * * A third case in which a sover-ign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sover-ign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable and would be withdrawn from the control of the sover-ign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require. * * * When private individuals of one nation spread themselves through another as business or caprice may direct, ming-

ling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction and the government to degradation if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country."

In Coleman *v.* Tennessee, 97 U. S., 509, 515, the court, referring to the case of the Exchange as authority, said:

"It is well settled that a foreign army permitted to march through a friendly country or to be stationed in it by permission of its government or sover-ign is exempt from the civil and criminal jurisdiction of the place."

The court quoted with approval the following passage from
58 the opinion of Chief Justice Marshall:

"The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."

So in Dow *v.* Jackson, 100 U. S., 158, 165, the same doctrine is recognized. Wheaton, in his Elements of International Law, part 2, chap. 2, § 9, says:

"A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sover-ign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place."

While the terms "troops" and "army" are used in the above citations, I have no reason to doubt that the rule or law of comity as there enunciated is equally applicable to such a military body as the naval detail in question. It is not disputed that comity is operative in the case of an organized regiment of a friendly foreign power while on our soil by permission of the Executive of the United States, and that proper discipline and obedience may be enforced by those in command without reference to our laws, nor is it disputed that comity is applicable to a marine force as well as to a land force. But the position is taken by the learned presiding judge in his opinion in this case that the rule of comity respects organized bodies only; that Captain Behr and the men under him were not an integral component of the Russian navy, not having become part of the crew of the Variag; that the fact that the men were by Russian law subject to the captain's control did not of itself make them, when conjointly considered, a constituent unit of the Russian navy; that the question whether Captain Behr's detail should be considered representative of the Russian navy cannot depend merely upon the number composing it; that the true criterion rests upon the distinction between the concrete parts into which a navy is usually divided and its individual members, the former standing for the navy, while the latter do not, and that Captain Behr and his men were neither marching through this country nor, in
59 the ordinary sense of the word, stationed here. I am unable to assent to the correctness of this line of reasoning or to the conclusion deduced from it. It is, in my judgment, based on too

technical and literal an interpretation of the language of the authorities, and falls far short of satisfying the broad policy underlying that language. The men composing the Russian detail in charge of Captain Behr certainly are not included in the category of "private individuals of one nation" who "spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other." While not completely organized as a crew, they nevertheless possessed organization. As before stated, they were in the naval service of Russia, and came to our soil in a body under military discipline for the sole purpose of manning a Russian war vessel. They were a portion of the military force of a foreign independent nation at peace with and friendly to the United States. It is wholly unimportant, in my judgment, that they had not actually gone abroad of the Variag as a fully organized crew or whether they were or were not fully armed and equipped. Nor is it of any moment that they may not technically have been "stationed" on our soil or were not technically "marching" over it. International comity is not to be frittered away by such refinements. They were here in the employ of their sovereign for strictly national objects and duties. Their organization and the character of their employment clearly brought them within the principles and rules of comity as observed among modern civilized nations, if they were on our soil by the permission or consent of the executive. Captain Behr and his men arrived in this country October 14, 1899. Ten days before such arrival the acting Secretary of the Treasury wrote a letter, of which the following is a copy:

60 "No. 19805. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *October* 4, 1899.

SIR: Acknowledging the receipt of your letter of the 24th ultimo, No. 57, I have the honor to inform you that, in compliance with request contained therein, instructions have been issued to the commissioner of immigration at the port of New York to admit, without examination, the detail of one officer and fifty-three regular sailors whom you state have been detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard in Philadelphia, Pennsylvania. The collector of customs has also been advised that the usual head tax of $1.00 is not to be collected in this case.

Respectfully yours, O. L. SPAULDING,
Acting Secretary T. U. S."

It is evident on the face of the letter that it was intended for and presumably directed to some representative of the Russian government. That he was the Russian ambassador can hardly be questioned. It appears from the record that the counsel for the respondents below offered the above copy in evidence, stating that the original was from the acting Secretary of the Treasury, permitting the landing of the detail, and was, as he understood, in the possession of the Russian ambassador at Washington. The offer was

objected to by the relator's counsel, but the copy was admitted; whereupon the objection was withdrawn. During the argument of the appeal it was stated positively by the counsel for the appellants that the original was addressed to the Russian ambassador at Washington. This statement in open court, while not expressly acquiesced in by the counsel for the appellee, was not denied, and the argument proceeded, and the case was heard on the assumption that the Russian ambassador was the recipient of the letter. Under the circumstances this court, in my opinion, must treat the above copy as the copy of a letter addressed to and received by the Russian ambassador. Here, then, is a written communication made by the Secretary of the Treasury, one of the branches of the executive department of the Government, directly to the immediate representative of Russian sover-ignty on our soil.

This letter on its face shows several important facts,
61 namely, (1) that it was written in reply to a letter of the Russian ambassador of September 24, 1899; (2) that the instructions issued to the commissioner of immigration to admit the detail without examination, and to the collector of customs not to collect head tax, were "in compliance with request contained therein"— that is to say, a request contained in the letter of the Russian ambassador; (3) that the Russian ambassador had stated that the detail of one officer and fifty-three regular sailors had been "detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard, in Philadelphia, Pennsylvania," and (4) that, whatever may have been the reason for not insisting upon examination or collection of head tax, the detail was to be admitted into the United States "in compliance with request" of the Russian ambassador. Assuming for the present that the action of the Secretary of the Treasury in thus dealing with the Russian ambassador must be taken as the act of the Executive, the Russian government had just cause to expect that its naval detail would be accorded the privileges and immunities incident to the observance of the comity due between independent but friendly nations, without which it might well be questioned whether that government would have allowed the entry of the detail upon our soil at all. There was a request by Russia through her ambassador, and permission and consent on the part of the executive department of the United States, that the detail should be admitted to our territory for the specific purpose of manning a Russian war vessel. I wholly fail to perceive any force in the suggestion that while the letter of the Secretary of the Treasury contemplated a dispensation of the usual examination and of the collection of head tax, it did not contain a permission that the detail should be admitted into the United States. Instructions to admit — or without examination or collection of head tax are still instructions to admit. The

contention that consent was not given for the admission of the
62 naval detail *qua* military force is, in my opinion, usually untenable. The permission contained in the letter was not to admit "private indi-cuals of one nation" to "spread themselves through another as business or caprice may direct," but to admit

"the detail of one officer and fifty-three regular sailors" who had been "detailed to this country for the purpose of partially manning the cruiser now under construction for the Russian government at Cramp's ship yard, in Philadelphia, Pennsylvania." Here is an express consent to the admission upon our soil of a military force *qua* military force, and in no other character or capacity. It was a naval detail under the command of a naval officer, and the sole purpose of its admission appears on the face of the letter to have been purely military, namely, the manning of a Russian war vessel. The contention under discussion seems to involve the assumption that as a prerequisite to the operation of comity the permission granted to a military force of a friendly foreign power to enter or remain upon our soil *qua* military force must be coupled with an enumeration of the privileges and immunities to be accorded to such force while here; but such an assumption is unfounded. While such a specification or enumeration may properly be the subject of convention between sover-ign powers, it is well settled that in the absence of such convention the admission upon our soil of a military force *qua* military force carries with it by implication the same right on the part of the commander to enforce discipline and compel obedience as exists in the country to which it belongs, in so far as its exercise is not prejudicial to us; and this right continues until terminated by an act of sover-ignty on the part of the United States. In the case of The Exchange, *supra*, Chief Justice Marshall, speaking of the passage through a sover-ign's dominions of the troops of a foreign prince by the allowance or permission of the former, said:

"In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sover-ign who should attempt to exercise it would cer-
63 tainly be considered as violating his faith. * * * The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."

The consent given by the executive department to the entry of the Russian detail for the purpose of manning the Variag by necessary implication involved consent that the detail should in that character remain on our soil and have a "right of passage" over our soil for that purpose. Good faith between friendly nations, as well as the obvious sense of the communication repudiates any other interpretation. The idea that the consent given was restricted to the mere admission of the detail upon our soil, and that it was intended that immediately thereafter that body should lose its cohesive power and discipline as part of the military force of Russia, is inadmissible. If the consent given by the Treasury Department is to be taken as the act of the Executive, international comity requires the recognition of a right on the part of Captain Behr, as commander of the detail, to exercise military discipline, which, of course, includes the usual and indispensable power possessed by commanders of military forces to arrest and have custody of a deserter.

The Executive speaks and acts through the heads of the several departments in relation to subjects pertaining to their respective duties, and their action with respect to such subjects is presumed to have been taken with the approval and by direction of the Executive. Wilcox *v.* Jackson, 13 Pet., 498, 513; United States *v.* Eliason, 16 Pet., 291, 302; the Confiscation cases, 20 Wall., 92, 109; United States *v.* Farden, 99 U. S., 10, 19; Wolsey *v.* Chapman, 101 U. S., 755, 769; Runkle *v.* United States, 122 U. S., 543, 557. The State Department is the executive branch of the Government which is charged with our foreign relations, and the Secretary of State, as the head of that department, is the usual channel of communication with foreign powers; but I am not aware that either he or that department is the only channel through which such com-
64 munication can be made. Certainly the Executive has power to communicate with a foreign ambassador through the Treasury Department touching matters in which the foreign sover-ign is interested, which are within the scope of the functions of that department; and if the Secretary of the Treasury deal with a foreign ambassador touching such matters, it must be presumed, in the absence of evidence to the contrary, that such dealing is had by direction and with the approval of the Executive. Especially is this true where without such authorization, general or specific, the action of that department would involve a breach of law. It is unreasonable that the exercise of comity should be made to depend in a case like this upon such formalities as would naturally and properly attend the granting of permission by the Government of the United States to a fully organized and equipped foreign army to traverse our territory. The law regards substance rather than form. The comity which should be observed between the United States and Russia as friendly nations at peace with each other should not be brushed aside on account of the absence of formalities, which in this case would have been unessential and uncalled for, if not out of place. Russia contracted with an American company for the building on American soil of a war vessel for the Russian government, and sent Captain Behr and his men to form part of her crew. At the request of the Russian ambassador the detail was admitted without examination or payment of head tax. Both of these matters were properly within the cognizance of the Treasury Department, and the action of the Secretary of the Treasury in so admitting the detail should be taken as the act of the Executive; but if it be assumed that the Secretary of the Treasury was without authority to admit the Russian detail to our soil as a military force, and, further, that the letter of October 4, 1899, was not addressed to or received by the Russian ambassador, how would the case stand?

I cannot perceive any difference in principle, so far as the
65 obligation to observe comity toward a friendly nation is concerned, between a case where a portion of its military force has entered the United States with the permission of the Executive and a case where a portion of the military force of such foreign nation, having entered the United States without the permission of the Executive, subsequently remains on our soil with such permission.

In either case the same line of reasoning is applicable. Chief Justice Marshall in the Exchange, *supra*, said:

"We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed. It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sover-ign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character or of exposing itself to the strategems and frauds of a power whose integrity might be doubted and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force, and an army marching into the dominions of another sover-ign may justly be considered as committing an act of hostility, and, if not opposed by force, acquires no privilege by its irregular and improper conduct. It may, however, well be questioned whether any other than the sover-ign power of the State be capable of deciding that such military commander is without a license."

It may seriously be doubted whether a detail of the Russian navy, consisting of an officer and fifty-three subordinates, peaceably entering this country for the purpose of manning a Russian war vessel constructed on our soil by an American company under a contract with the Russian government, can justly be considered on the same footing as "an army marching into the dominions of another sover-ign" in the sense in which those words were employed in the above-quoted clause. If, however, it be conceded that such detail should be so considered there is no evidence whatsoever that the executive or any other branch of government of the United States has decided that such detail entered this country or has remained here without proper license or permission. Wholly aside
66 from the correspondence with the Russian ambassador, the record shows the military character of the detail and the purpose for which it came to and remained on our soil, and the United States has not in any manner questioned the authority and right of that detail to continue here in that character for the accomplishment of the purpose for which it came. On the contrary, the Government has clearly recognized such right and authority. By leave of this court the United States attorney for the eastern district of Pennsylvania at the hearing filed the following suggestion:

"United States Circuit Court of Appeals, Third Circuit, September Term, 1900.

THE KEEPER OF THE PHILADELPHIA COUNTY PRISON and CAPTAIN VLADIMIR BEHR, Master of the Russian Cruiser Variag, Appellants,

v.

THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.

And now, to wit, this first day of October, A. D. 1900, comes James B. Holland, Esquire, United States attorney for the eastern district of Pennsylvania, at the instance of the executive department of the Government of the United States, and filed of record a suggestion, as follows:

Inasmuch as it appears by the record in the above-entitled cause that Leo Alexandroff, the relator, is a subject and citizen of the Empire of Russia and enrolled in the naval service of his country as an assistant physician; that he came to the United States, together with fifty-two other men, under the charge of an officer of the Russian imperial marine, detailed for the purpose of manning the cruiser Variag, a vessel under construction for the Russian government by the William Cramp Ship and Engine Building Company of Philadelphia; that prior to the arrival of the said officer and men and in pursuance of correspondence with the Russian ambassador instructions were issued by the Secretary of the Treasury, at Washington, to the commissioner of immigration at New York, admitting the said officer and his subordinates for the purpose of partially manning the cruiser, and inasmuch as the said Leo Alexandroff remained in the Russian naval service after his arrival in the United States until April 20th, 1900, when he deserted, lived a week in Philadelphia, and then went to New York, where he was apprehended by Captain Vladimir Behr, master of the Variag, brought to Philadelphia and confined in the county prison for safe keeping, and inasmuch as his period of enlistment in the Russian imperial service was for six years from 1896, and in pursuance of said enlistment he left Russia for America, knowing he was to become one of the crew of the newly constructed cruiser, and for that purpose alone, and upon his arrival here and until he deserted lived with the other members of his company, was supported by the Russian government, and received wages for his services as a member of her crew, and inasmuch as it further appears by the record in the above-entitled cause that the said cruiser Variag was built under written contract between the Russian government and the Cramp Company, which provided, among other things, as — reference to the said record will more fully and at large appear, that the said vessel and all materials entering into her or intended for her construction should
67 become and be the exclusive property of the Russian ministry of marine, and inasmuch, further, as there exists between the United States of America and His Majesty the Emperor of Russia a state of peace and amity, and inasmuch as it does not appear but

that the said officer having in charge the relator and the other sailors he brought to this country has conformed in all things to the law of nations and the laws of the United States, and his authority over and custody and control of the said relator should not be interfered with directly or indirectly by the Government of the United States or by any of the courts created in pursuance thereof, it is respectfully suggested to the honorable the judges of the circuit court of appeals for the third circuit that Leo Alexandroff, the relator, should be remanded to the custody of the keeper of the county prison, at Philadelphia, to await the order of Captain Vladimir Behr, the master of said cruiser Variag.

JAMES B. HOLLAND,
United States Attorney."

This suggestion made by executive authority, while informal in some respects, not only is a direct recognition and ratification by the Executive of the action of the Secretary of the Treasury in admitting Captain Behr and his command to our soil, but discloses in an unmistakable manner that the attitude of the Government toward that detail is and has been one of international comity. It is not susceptible of any other construction. Further than this, it is a request by the Executive, addressed to this court, that the relator, who is now within its control, be remanded to the custody of the keeper of the prison to await the orders of Captain Behr on the ground that, in view of the existence of a state of peace and amity between the United States and Russia, Captain Behr's "authority over and control of the said relator should not be interfered with directly or indirectly by the Government of the United States or by any of the courts." I do not deem it of any moment that the suggestion refers to facts as appearing by the record instead of independently averring such facts. This at most could constitute only a formal defect. If the record discloses facts sufficient to warrant the observance by the Executive of comity toward Russia with respect to Captain Behr and his command it is all that was necessary. Facts appearing by the record are quite as potent as facts independently asserted in a suggestion if reference be made to the record as disclosing them. That the facts referred
68 to in the suggestion and which appear by the record are sufficient I have no reason to doubt. The attitude of the executive department toward the Russian detail must be regarded as the result of an executive decision, political in its character, which should be respected by all courts. To hold that Captain Behr has no right to the custody of the relator as a deserter from the military force under his command is, in my judgment, not only to ignore the obligations of international comity, but to thwart the executive will as declared to this court in a matter properly of executive determination. Captain Behr, having, as matter of military discipline, the right summarily to arrest and confine the relator as a deserter, misconceived his remedy, erroneously supposing that the facts brought the case within the provisions of article IX of the treaty of December, 1832, between the United States and Russia;

but, although the commitment of the relator to prison in the proceedings taken was not justified by the facts, the court below was not, nor is this court, obliged to discharge him. By virtue of section 761 of the Revised Statutes the court has authority to dispose of him "as law and justice require."

In Nishimura Ekiu *v.* United States, 142 U. S., 651, 662, Mr. Justice Gray, in delivering the opinion of the court, said:

"A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and, if sufficient ground for his detention by the Government is shown, he is not to be discharged for defects in the original arrest or commitment."

The intent of sec. 761 is that the party seeking a discharge through *habeas corpus* proceedings should be disposed of as law and justice at the time of such disposition shall require. Iasigi *v.* Van de Carr, 166 U. S., 391. I cannot assent to the proposition advanced in the opinion of the learned presiding judge that the question here presented relates to the right of an officer of a foreign navy to require the assistance of the courts
69 of this country for the recapture of a deserter. Captain Behr is not the actor in this case. On the contrary, the relator has proceeded against Captain Behr and the keeper of the county prison. The former was committed by a United States commissioner to the custody of the keeper of the prison, to be held subject to the order of the Russian vice-consul at Philadelphia or of Captain Behr, master of the Variag. The relator in his petition for a writ of *habeas corpus* prayed that the writ might be directed to the keeper of the prison and to Captain Behr, and the writ was so directed. Although the commitment was illegal, the relator was in fact held by the keeper of the prison subject to the order of Captain Behr, and it was in the power of the latter at any time before the filing of the petition for the writ of *habeas corpus* to take bodily possession of the relator. While the keeper of the prison may not legally have been the agent of Captain Behr, yet his possession of the relator was potentially a possession by Captain Behr, and the writ of *habeas corpus* had for its object the termination of the actual control possessed by Captain Behr over the relator. Having reached the conclusion that Captain Behr, by the law of comity, has from the time of the relator's desertion been and now is justly entitled to the possession of the relator's person, I am of the opinion that the judgment of the court below should be reversed, with directions to remand the relator to the custody of the keeper of the prison, to be by him delivered to Captain Behr or, on his order, to the Russian vice-consul at Philadelphia.

February 23, 1901.

EDWARD G. BRADFORD.

70 In the United States Circuit Court of Appeals for the Third Circuit, September Term, 1900.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag," Appellants,
vs.
THE UNITED STATES OF AMERICA *ex Relatione* LEO ALEXANDROFF, Appellee.
} No. 22.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the district court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order of the said district court in this cause be, and the same is hereby, affirmed.

GEO. M. DALLAS, *Cir. Judge.*

Philadelphia, February 26, 1901.

71 In the United States Circuit Court of Appeals for the Third Circuit, September Term, 1900.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser "Variag," Appellants,
vs.
THE UNITED STATES OF AMERICA *ex Relatione* LEO ALEXANDROFF, Appellee.
} No. 22.

Appeal from the district court of the United States for the eastern district of Pennsylvania.

And now, to wit, this 28th day of March, A. D. 1901, it is ordered that mandate issue to the said district court of the United States for the eastern district of Pennsylvania in accordance with the opinion and decree of this court in said cause.

GEO. M. DALLAS, *Cir. Judge.*

72 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable judges of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Whereas lately, in the district court of the United States for the eastern district of Pennsylvania, before you or some of you, in a cause between Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian

cruiser "Variag," appellants, and The United States of America *ex relatione* Leo Alexandroff, appellee, wherein the opinion of the said district court entered in said cause on the 12th day of July, A. D. 1900, contained the following order, viz:

"It is accordingly ordered that the prisoner be discharged from custody;"

73 as by the inspection of the transcript of the record of the said district court, which was brought into the United States circuit court of appeals for the third circuit by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears;

74 And whereas in the present term of September, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order of the said district court in this cause be, and the same is hereby, affirmed.

Philadelphia, February 26, 1901.

75 You, therefore, are hereby commanded that such proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 29th day of March, in the year of our Lord one thousand nine hundred and one.

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 22, Sept. term, 1900. Keeper of Philada. County Prison and Captain Vladimir Behr, appellants, *vs.* United States *ex rel.* Leo Alexandroff. Mandate.

76 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages, from one to seventy-five, inclusive, to contain a full, true, complete, and faithful copy of the original transcript of record in the case wherein Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," are appellants and The United *United* States of America *ex relatione* Leo Alexandroff is appellee, on file and now remaining among the records of the said court in my office.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this second day of April, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-fifth.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Robert C. Motherwell, Jr., keeper of the Philadelphia county prison, and Captain Vladimir Behr, master of the Russian cruiser "Variag," are appellants and The United States *ex rel.* Leo Alexandroff is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
78 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

79 [Endorsed:] File No., 18,127. Supreme Court of the United States. No. 642, October term, 1900. Wm. R. Tucker, vice-consul, &c., *vs.* The United States *ex rel.* Leo Alexandroff. Writ of certiorari.

80 S. C. of U. S., October Term, 1900.

ROBERT C. MOTHERWELL, JR., Keeper of the Philadelphia County Prison, and Captain Vladimir Behr, Master of the Russian Cruiser Variag, Appellants,
vs.
THE UNITED STATES OF AMERICA *ex Rel.* LEO ALEXANDROFF, Appellee.
} No. 642.

Appeal from the United States circuit court of appeals for the third circuit.

It is hereby stipulated and agreed by counsel of record that the certified transcript on file in the Supreme Court of the United States may be taken and used as a return to the writ of certiorari.

PAUL FULLER,
JOHN F. LEWIS,
Attorneys for Appellants.
ISAAC HASSLER,
BERNARD HARRIS,
Attorneys for Appellee.

May 3rd, 1901.

81 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify to the Supreme Court of the United States the consent of the counsel for the respective parties thereto as my return to the said writ.

Seal United States Circuit Court of Appeals, Third Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia. this third day of May, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-fifth.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

82 [Endorsed:] File No., 18,127. Supreme Court U. S., October term, 1901. Term No., 303. William R. Tucker, vice-consul, &c., *vs.* The U. S. *ex rel.* Leo Alexandroff. Writ of certiorari and return thereto. Office Supreme Court U. S. Filed May 4, 1901. James H. McKenney, clerk.